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No. 13600

United States
Court of Appeals
for the Ninth Circuit

ANGLO CALIFORNIA NATIONAL BANK OF
SAN FRANCISCO, Appellant,

vs.

SCHENLEY INDUSTRIES, INC., a corporation,
Appellee.

CHARLES W. EBNOTHER, Trustee of the
Estate of Hedgeside Distillery Corporation,
Bankrupt, Appellant,

vs.

SCHENLEY INDUSTRIES, INC., a corporation,
Appellee.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 480, inclusive)

Appeals from the United States District Court for the Northern
District of California, Northern Division

JUL - 9 1953

PAUL P. O'BRIEN

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for
the Northern District of California,
Northern Division

In Bankruptcy—No. 11327

In the Matter of

HEDGESIDE DISTILLERY CORPORATION, a
corporation,

Bankrupt.

RECLAMATION PETITION

To Bernard J. Abrott, Esq., Referee in Bankruptcy:

The petition of Schenley Industries, Inc., a corporation, respectfully represents:

I.

Petitioner herein, Schenley Industries, Inc., is a corporation authorized to do and doing business within the State of California. Prior to January 4, 1949, the corporate name of petitioner was "Schenley Distillers Corporation" and on said date the corporate name of petitioner was changed to "Schenley Industries, Inc."

II.

On or about May 17, 1949, an involuntary petition in bankruptcy was filed in this court by Rheem Manufacturing Company, Charles J. Youngberg and Capitol Cigar & Liquor Company, creditors of Hedgeside Distillery Corporation, a corporation, praying that said corporation be adjudged a bankrupt, and on June 2, 1949, said Hedgeside Distillery

Corporation was duly adjudicated a bankrupt and on said day these proceedings were duly referred to Bernard J. Abrott, Esq., Referee in Bankruptcy.

III.

On July 26, 1949, Charles W. Ebnoter, Esq., was duly appointed trustee of the property of said bankrupt and has qualified and is now the duly appointed, qualified and acting trustee in bankruptcy of said Hedgeside Distillery Corporation, Bankrupt.

IV.

At the time of the filing of said petition in bankruptcy herein, said bankrupt had in its possession, and said trustee now has in his possession, the following property belonging to petitioner, to wit:

2,893 barrels of whiskey, and
6,040 barrels of grain spirits

8,933 Total

stored in bond for petitioner in Internal Revenue Bonded Warehouse No. 2, Hedgeside Distillery Corporation, Napa, California, the serial numbers of said barrels being set out in Exhibit A, incorporated by reference herein and made a part hereof for all purposes.

V.

Said barrels of whiskey and grain spirits are covered by warehouse receipts issued by the bankrupt to petitioner and now held by petitioner, the serial numbers of said warehouse receipts being fully set out in Exhibit A.

VI.

Petitioner was at the time of the filing of said petition in bankruptcy herein, and is now the owner of said barrels of whiskey and grain spirits, and is entitled to the immediate possession of said property.

VII.

Petitioner has made demand on said trustee for the surrender of said 8,993 barrels of whiskey and grain spirits, but said trustee has failed and refused to surrender the same.

VIII.

Your petitioner is informed and believes and therefore represents the fact to be, that Anglo California National Bank of San Francisco, No. 1 Sansome Street, San Francisco, California, claims an interest in said property adverse to petitioner, and is therefore a proper party to this proceeding.

Wherefore, your petitioner prays for an order upon said Charles W. Ebnother, Trustee, requiring him to surrender said 8,933 barrels of whiskey and grain spirits to petitioner, and for such other and further relief as is just.

Dated: San Francisco, California, September 26, 1949.

SCHENLEY INDUSTRIES, INC.,

[Seal] By JAS. E. WOOLSEY,

Assistant Secretary.

BRONSON, BRONSON & MCKIN-
NON,

/s/ By KIRKE La SHELLE.

Duly Verified.

EXHIBIT A

Number of Barrels	Warehouse Receipt Numbers	Date of Issue of Ware- house Receipt	Serial Numbers of Barrels
Whiskey:			
125	3681B	12/22/48	398 to 522 inclusive
425	3682B	12/22/48	523 to 947 inclusive
45	3511B	11/20/47	948 to 992 inclusive
310	3682B	12/22/48	994 to 1303 inclusive
882	3683B	12/22/48	1304 to 2185 inclusive
1,017	3684B	12/22/48	2186 to 3202 inclusive
40	3512B	11/20/47	3777 to 3816 inclusive
49	3512B	11/20/47	3906 to 3954 inclusive
<hr/>			
2,893			
Grain Spirits:			
42	3381B	3/18/47	4351 to 4392 inclusive
38	3383B	3/19/47	4393 to 4430 inclusive
42	3384B	No Date	4431 to 4472 inclusive
36	3385B	3/21/47	4473 to 4508 inclusive
46	3392B	3/24/47	4509 to 4554 inclusive
26	3393B	3/25/47	4555 to 4580 inclusive
46	3398B	3/26/47	4581 to 4626 inclusive
27	3399B	3/27/47	4627 to 4653 inclusive
25	3400B	3/27/47	4654 to 4678 inclusive
31	3402B	3/28/47	4679 to 4709 inclusive
31	3403B	3/28/47	4710 to 4740 inclusive
37	3404B	3/31/47	4741 to 4777 inclusive
32	3407B	4/ 1/47	4778 to 4809 inclusive
85	3671B	12/ 6/48	5735 to 5819 inclusive
15	3671B	12/ 6/48	5837 to 5851 inclusive
2	3673B	12/ 7/48	5852 to 5853 inclusive
17	3673B	12/ 7/48	5888 to 5904 inclusive
18	3673B	12/ 7/48	5940 to 5957 inclusive
60	3673B	12/ 7/48	5976 to 6035 inclusive
3	3673B	12/ 7/48	6239 to 6241 inclusive
68	3674B	12/ 8/48	6242 to 6309 inclusive
19	3674B	12/ 8/48	6351 to 6369 inclusive
13	3674B	12/ 8/48	6432 to 6444 inclusive
28	3675B	12/ 9/48	6445 to 6472 inclusive

Number of Barrels	Warehouse Receipt Numbers	Date of Issue of Ware- house Receipt	Serial Numbers of Barrels
Grain Spirits—(Continued)			
44	3675B	12/ 9/48	6495 to 6538 inclusive
28	3675B	12/ 9/48	6560 to 6587 inclusive
20	3676B	12/10/48	6588 to 6607 inclusive
32	3676B	12/10/48	6966 to 6997 inclusive
48	3676B	12/10/48	7031 to 7078 inclusive
73	3678B	12/17/48	7079 to 7151 inclusive
20	3678B	12/17/48	7169 to 7188 inclusive
4	3678B	12/17/48	7382 to 7385 inclusive
3	3678B	12/17/48	7388 to 7390 inclusive
100	3679B	12/20/48	7391 to 7490 inclusive
50	3679B	12/20/48	7713 to 7762 inclusive
50	3680B	12/21/48	7763 to 7812 inclusive
50	3685B	12/22/48	7813 to 7862 inclusive
6	3685B	12/22/48	7863 to 7868 inclusive
44	3685B	12/22/48	7888 to 7931 inclusive
123	3686B	12/23/48	7932 to 8054 inclusive
27	3686B	12/23/48	8082 to 8108 inclusive
12	3687B	12/27/48	8109 to 8120 inclusive
35	3687B	12/27/48	8146 to 8180 inclusive
105	3364B	2/24/47	62257 to 62361 inclusive
100	3366B	2/25/47	62362 to 62461 inclusive
38	3365B	2/25/47	62462 to 62499 inclusive
44	3386B	3/21/47	64201 to 64244 inclusive
94	3391B	3/24/47	64245 to 64338 inclusive
38	3394B	3/25/47	64339 to 64376 inclusive
58	3395B	3/25/47	64377 to 64434 inclusive
59	3396B	3/25/47	64435 to 64493 inclusive
96	3397B	3/26/47	64494 to 64589 inclusive
90	3401B	3/27/47	64590 to 64679 inclusive
92	3405B	3/31/47	64680 to 64771 inclusive
100	3406B	4/ 1/47	64772 to 64871 inclusive
48	3408B	4/ 2/47	64872 to 64919 inclusive
50	3409B	4/ 2/47	64920 to 64969 inclusive
44	3410B	4/ 2/47	64970 to 65013 inclusive
90	3412B	4/ 3/47	65014 to 65103 inclusive
10	3414B	4/ 7/47	65104 to 65113 inclusive
57	3420B	4/ 9/47	65385 to 65441 inclusive
80	3435B	4/17/47	65921 to 66000 inclusive

Number of Barrels Grain	Warehouse	Date of Issue	Serial
	Receipt Numbers	of Ware- house Receipt	Numbers of Barrels
Spirits—(Continued)			
50	3480B	10/27/47	68747 to 68796 inclusive
20	3481B	10/27/47	68797 to 68816 inclusive
16	3482B	10/28/47	68817 to 68832 inclusive
50	3484B	10/28/47	68833 to 68882 inclusive
35	3486B	10/29/47	68883 to 68917 inclusive
56	3505B	11/17/47	69856 to 69911 inclusive
81	3509B	11/19/47	69985 to 70065 inclusive
70	3510B	11/20/47	70066 to 70135 inclusive
69	3525B	11/24/47	70228 to 70296 inclusive
137	3529B	11/28/47	70350 to 70486 inclusive
69	3430B	11/28/47	70487 to 70555 inclusive
27	3538B	No Date	70942 to 70968 inclusive
50	3539B	12/ 8/47	70969 to 71018 inclusive
74	3541B	12/10/47	71069 to 71142 inclusive
96	3543B	12/11/47	71143 to 71238 inclusive
85	3544B	12/12/47	72139 to 71323 inclusive
173	3545B	12/15/47	71324 to 71496 inclusive
3	3670B	12/ 3/48	71798 to 71800 inclusive
100	3665B	12/ 1/48	71852 to 71951 inclusive
149	3669B	12/ 2/48	71952 to 72100 inclusive
1	3669B	12/ 2/48	72199
59	3670B	12/ 3/48	72200 to 72258 inclusive
9	3567B	2/16/48	72880 to 72888 inclusive
76	3568B	2/16/48	72889 to 72964 inclusive
83	3569B	2/17/48	72965 to 73047 inclusive
67	3572B	2/23/48	73173 to 73239 inclusive
81	3573B	2/24/48	73240 to 73320 inclusive
86	3575B	2/25/48	73384 to 73469 inclusive
11	3590B	3/ 8/48	73910 to 73920 inclusive
86	3592B	3/ 9/48	73971 to 74056 inclusive
63	3593B	3/10/48	74057 to 74119 inclusive
85	3597B	3/16/48	74237 to 74321 inclusive
47	3598B	3/17/47	74322 to 74368 inclusive
110	3602B	3/22/48	74487 to 74596 inclusive
80	3605B	3/23/48	74643 to 74722 inclusive
91	3606B	3/24/48	74723 to 74813 inclusive
83	3670B	12/ 3/48	74913 to 74995 inclusive
84	3610B	4/ 8/48	75462 to 75545 inclusive

Number of Barrels	Warehouse Receipt Numbers	Date of Issue of Ware- house Receipt	Serial Numbers of Barrels
Grain Spirits—(Continued)			
80	3616B	4/ 9/48	75546 to 75625 inclusive
31	3617B	4/12/48	75626 to 75656 inclusive
75	3618B	4/14/48	75657 to 75731 inclusive
84	3619B	4/15/48	75732 to 75815 inclusive
25	3621B	4/16/48	75816 to 75840 inclusive
59	3622B	4/20/48	75882 to 75940 inclusive
59	3623B	4/22/48	75941 to 75999 inclusive
55	3624B	4/23/48	76000 to 76054 inclusive
86	3629B	5/ 6/48	76294 to 76379 inclusive
25	3631B	5/10/48	76449 to 76473 inclusive

6,040

Total 8,933

[Endorsed]: Filed Oct. 9, 1949.

[Title of District Court and Cause.]

ANSWER OF CHARLES W. EBNOTHER AS
TRUSTEE OF HEDGESIDE DISTILLERY
CORPORATION, A CORPORATION,
BANKRUPT, TO RECLAMATION PETI-
TION FILED BY SCHENLEY INDUS-
TRIES, INC.

Now comes Charles W. Ebnoter, as Trustee of Hedgeside Distillery Corporation, a corporation, the above named bankrupt, and for his answer to said Reclamation Petition filed by said Schenley Industries, Inc., admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraphs I, II, III, VII and VIII of said Reclamation Petition.

II.

Denies generally and specifically, each and every, all and singular the allegations contained in paragraph IV. of said Reclamation Petition.

III.

Answering paragraph V of said Petition of Reclamation, respondent admits that the barrels of whiskey and grain spirits set out in Exhibit "A" attached to said Petition for Reclamation are covered by warehouse receipts issued by the above named bankrupt corporation to said petitioner; and in this respect alleges that said warehouse receipts issued to said petitioner and covering said whiskey and grain spirits set out in Exhibit "A" attached to said petition for reclamation were and are now void as against the unsecured creditors of said bankrupt corporation in that at the time said warehouse receipts were issued, the barrels of whiskey and spirits described in Exhibit "A" attached to said Reclamation Petition were and now are the property of said bankrupt corporation and there was no transfer accompanied by any delivery or change of possession from said bankrupt corporation to said petitioner herein as required by the provisions of Section 3440 of the Civil Code of the State of California.

IV.

Denies generally and specifically each and every, all and singular the allegations contained in paragraph VI of said reclamation petition.

Wherefore, your petitioner as such Trustee of

Hedgeside Distillery Corporation, a corporation, the above named bankrupt, prays that the reclamation petition of Schenley Industries, Inc. be denied and that the legal title to the 8,933 barrels of whiskey and grain spirits described in said reclamation petition and Exhibit "A" attached thereto, in possession of the above named bankrupt at the time of the filing of the involuntary petition in bankruptcy and now in the possession and under the control of said respondent as Trustee in bankruptcy of the above named bankrupt, be adjudicated in your respondent as such Trustee, free and clear of any and all liens and claims of every nature and description whatsoever by Schenley Industries, Inc. and the said Anglo California National Bank of San Francisco.

HEDGESIDE DISTILLERY CORPORATION, a corporation,

/s/ By CHARLES W. EBNOTHER,
Trustee.

FRANCIS P. WALSH,
HENRY GROSS,

Attorneys for Trustee,

/s/ By FRANCIS P. WALSH.

Duly Verified.

[Endorsed]: Filed Oct. 18, 1949.

[Title of District Court and Cause.]

ANSWER TO RECLAMATION PETITION

Now comes The Anglo California National Bank of San Francisco, a national banking association, appearing specially herein only for the purpose of answering an Order to Show Cause of the Honorable Bernard J. Abrott, Referee in Bankruptcy, why petition of Schenley Industries, Inc., a California corporation, for reclamation of property should not be granted, and for its answer to said reclamation petition admits, denies and alleges as follows:

1. States that your answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph I of said reclamation petition and on that ground denies said allegations and each thereof.

2. Admits the allegations of Paragraph II of said reclamation petition.

3. Admits the allegations of Paragraph III of said reclamation petition.

4. Denies each of the allegations of Paragraph IV of said reclamation petition.

5. States that your answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph V of said reclamation petition and on that ground denies each of said allegations; and as further answer to said Paragraph V your answering defendant states that it is informed and believes and on that ground alleges that any issuance

by the bankrupt of the warehouse receipts on barrels of whiskey mentioned in Exhibit A attached to said petition is void as such receipts are subsequent to warehouse receipts issued by the bankrupt to your answering defendant to secure repayment of money advances made by your answering defendant to the bankrupt; said receipts as issued are numbered 3469B, 3470B, 3472B, 3474B, 3475B, 3576B and 3477B; and on the same ground further alleges that the warehouse receipts on whiskey and grain spirits mentioned in said Exhibit "A", together with those issued to petitioner's predecessors in title, were and are now void as against the unsecured creditors of the bankrupt in that at the time said warehouse receipts were issued the said barrels of whiskey and spirits purported to be transferred by same were the property of the bankrupt and there was no delivery followed by any actual and/or continued change of possession of said barrels of whiskey or grain spirits.

6. States that your answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph VI of said reclamation petition and on that ground denies said allegations and each thereof, and as a part of said denial denies that petitioner Schenley Industries, Inc. is entitled to the immediate possession of any barrels of whiskey and/or grain spirits in the possession of the trustee in bankruptcy and on the premises of the bankrupt at Napa, California.

7. States that your answering defendant is with-

out knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph VII of said reclamation petition and on that ground denies said allegations and each thereof.

8. Answering Paragraph VIII of said reclamation petition admits that your answering defendant claims an interest in the 8,933 barrels of whiskey and grain spirits as to which Schenley Industries, Inc. seeks the surrender of by the trustee in bankruptcy; and in this connection alleges that your answering defendant on or about the dates hereinafter mentioned loaned to the bankrupt in good faith the sums of money set forth and received as security for the repayment of said sums a pledge of the whiskey and grain spirits covered respectively by the warehouse receipts listed below:

Whiskey

Original Note Date	Amount Advanced	Warehouse Receipt		Barrels	Serial No.
		No.	Date		
6/18/47	\$ 7,980.	3469B	6/17/47	266	298-563
7/ 8/47	19,470.	3470B	7/17/47	694	564-947
7/30/47	3,000.	3472B	7/30/47	100	994-1303 1304-1403
9/10/47	3,000.	3474B	9/10/47	100	1404-1503
9/17/47	6,000.	3475B	9/16/47	200	1504-1703
9/17/47	6,000.	3476B	9/16/47	200	1704-1903
10/22/47	6,000.	3477B	10/23/47	200	1904-2103
12/18/47	6,000.	3548B	12/17/47	200	2104-2303
9/17/48	42,253.	3652B	9/16/48	899	2304-3202
	\$99,703.			2859	

Grain Spirits

1/ 5/49	\$18,130.	3689B	1/ 5/49	574	70228-70296 70942-71018 71069-71496
---------	-----------	-------	---------	-----	---

No part of said amounts so advanced have been repaid and said sums and all thereof are now due, owing and unpaid.

Wherefore, The Anglo California National Bank of San Francisco having fully answered, prays that the petitioner take nothing by its petition for reclamation.

Dated: October 18th, 1949.

/s/ FREDERICK M. FISK,

/s/ CHICKERING & GREGORY,

Attorneys for The Anglo California National Bank of San Francisco, appearing herein specially.

Duly Verified.

[Endorsed]: Filed Oct. 18, 1949.

[Title of District Court and Cause.]

ORDER ON RECLAMATION PETITION

The verified petition of Schenley Industries, Inc., a corporation, hereinafter referred to as Petitioner, for reclamation from the trustee, filed herein on September 27, 1949, having come on regularly for hearing before the Honorable Bernard J. Abrott, Referee in Bankruptcy, at Oakland, California, commencing on October 19, 1949, and continuing from time to time thereafter until concluded on December 11, 1950, on said verified petition and the verified answers in opposition thereto of the Anglo California National Bank of San Francisco, herein-

after referred to as "Anglo Bank", and Charles W. Ebnother, Esquire, as Trustee in bankruptcy of the above named bankrupt, and upon all the other papers, records, and files herein, and petitioner appearing by its counsel, Messrs. Bronson, Bronson & McKinnon, by and through Kirke LaShelle, Esquire, and John F. Ward, Esquire, and said Anglo Bank appearing by its counsel Messrs. Chickering and Gregory, by and through Frederick M. Fisk, Esquire and Bruce M. Casey, Jr., Esquire, and said Trustee appearing in person and by his counsel Francis P. Walsh, Esquire, and evidence, both oral and documentary, having been submitted to the Court by petitioner in support of said petition, by Anglo Bank in support of its adverse claim in opposition to said petition, and by the Trustee in opposition to said petition, and the Court having received the oral and written arguments of counsel for said parties and having duly considered all of the evidence and said arguments, and the cause having been submitted for decision, the Court now makes its

FINDINGS OF FACT

1. Petitioner herein is now and at all times herein mentioned was a corporation authorized to do and doing business within the State of California. Prior to January 4, 1949, the corporate name of petitioner was "Schenley Distillers Corporation" and on said date the corporate name of petitioner was changed to "Schenley Industries, Inc."

2. The bankrupt, Hedgeside Distillery Corporation, hereinafter referred to as "Hedgeside", was

duly adjudicated as a bankrupt on or about June 2, 1949, an involuntary petition in bankruptcy having been filed in the above entitled court by three of its creditors on or about May 17, 1949; on or about June 2, 1949, said bankruptcy proceedings were duly referred to the Honorable Bernard J. Abrott, Referee in Bankruptcy; on or about July 26, 1949, Charles W. Ebnother, Esquire, was duly appointed trustee of the property of said bankrupt, and thereafter qualified and is now, and at all times during the pendency of the reclamation petition has been, the duly appointed, qualified and acting trustee in bankruptcy of said bankrupt; the Anglo Bank is, and at all times mentioned herein was, a national banking association with its principal office at San Francisco, California.

3. At the time of the filing of said involuntary petition in bankruptcy, to-wit: on or about May 17, 1949, the bankrupt had in its possession and the trustee has at all times since July 26, 1949 and now has in his possession the following described property:

8,933 barrels of whiskey and grain spirits stored in bond by the bankrupt for petitioner in Internal Revenue Bonded Warehouse No. 2, Hedgeside Distillery Corporation, Napa, California, the serial numbers of said barrels and warehouse receipt data being set out in Exhibit A hereto, incorporated by this reference herein and made a part hereof for all purposes;

Petitioner has made demand on the trustee for the surrender of said 8,933 barrels of whiskey and

grain spirits, and said trustee has failed and refused to surrender the same to petitioner.

4. Said 8,933 barrels of whiskey and grain spirits were purchased for value by petitioner from the respective owners thereof as set forth below; said owners intended to transfer the ownership and legal title thereto to petitioner on the respective dates of the transactions set forth below in exchange for the purchase price which said owners received, and at the time of the filing of said petition in bankruptcy said 8,933 barrels stored in bond in Internal Revenue Bonded Warehouse No. 2 were covered by warehouse receipts issued to petitioner by Hedgeside and now held by petitioner, the serial numbers and dates of issue of said warehouse receipts being set out in Exhibit A hereto, incorporated by this reference herein and made a part hereof for all purposes; said purchases and sales were made in the following manner:

(a) Petitioner purchased a total of 4,815 barrels of said spirits from Hedgeside, the Bankrupt;

Beginning in March, 1947, petitioner purchased 1,293 barrels of said spirits from Hedgeside pursuant to a production contract for grain spirits dated September 17, 1945 (Petitioner's Exhibit Nos. 14 and 15) as amended (Petitioner's Exhibit Nos. 16, 17, 18, 19, 20 and 21), the documentary evidence of said purchase and sale, including warehouse receipts covering said spirits, being contained in petitioner's Exhibit No. 52; beginning in October, 1947, petitioner purchased 3,191 barrels of said spirits from Hedgeside pursuant to a production

contract for grain spirits dated October 13, 1947 (Petitioner's Exhibit Nos. 22-A and 22-B), the documentary evidence of said purchase and sale being contained in Petitioner's Exhibit Nos. 53 and 65; all of said 1,293 and 3,191 barrels of spirits purchased under said production contracts were inspected and accepted by a representative of petitioner at Hedgeside as produced, said spirits were placed in barrels furnished by petitioner for that purpose, said barrels of spirits were then immediately stored in bond in Hedgeside's Internal Revenue Bonded Warehouse No. 2, Napa, California, and warehouse receipts covering said spirits were issued by Hedgeside to petitioner which warehouse receipts are still held by petitioner, excepting that the spirits covered by warehouse receipt numbers 3665-B, 3669-B, and 3670-B were originally stored in bond in Internal Revenue Bonded Warehouse No. 111 of Franciscan Farm and Livestock Corp., a corporation, located at Yountville, California, and thereafter transferred in bond to Hedgeside Internal Revenue Bonded Warehouse No. 2, as set out in Petitioner's Exhibit No. 45;

Also pursuant to said contract of October 13, 1947 (Petitioner's Exhibit Nos. 22-A and 22-B) in November, 1947, petitioner purchased from Hedgeside 331 barrels of "on Hand" spirits [part of which was in fact whiskey but which has been treated by the parties throughout as grain spirits], the documentary evidence of said purchase and sale being contained in Petitioner's Exhibit Nos. 50 and 65; of the warehouse receipts now held by petitioner

covering said 331 barrels, warehouse receipts Nos. 3511-B and 3512-B were issued by Hedgeside to Petitioner at the time of said sale and the spirits covered thereby were then stored in bond in Hedgeside Internal Revenue Bonded Warehouse No. 2, whereas the spirits now covered by warehouse receipts Nos. 3671-B and 3673-B were at the time of said sale stored in bond in Internal Revenue Bonded Warehouse No. 111 of Franciscan Farm and Livestock Corp., and thereafter transferred in bond to Hedgeside Internal Revenue Bonded Warehouse No. 2, as set out in Petitioner's Exhibit No. 45; a true and correct summary of the evidence of said purchases of the above 4,815 barrels of said spirits by Petitioner from Hedgeside is set out in Exhibit "B" hereto which is incorporated herein and made a part hereof for all purposes.

(b) Petitioner purchased a total of 1,359 barrels of said grain spirits from Franciscan Farm and Livestock Corp., a California corporation;

In March and April, 1947, pursuant to a production contract for grain spirits between one R. I. Stone, d.b.a. Franciscan Farm and Livestock Corp., and petitioner, dated November 1, 1945, assigned by Stone to Franciscan Farm and Livestock Corp., a California corporation (Petitioner's Exhibits Nos. 23 and 25-B), petitioner purchased 459 barrels of said spirits from Franciscan Farm and Livestock Corp., the documentary evidence of said purchase and sale being contained in Petitioner's Exhibit No. 49; concurrently with the production and sale of

said 459 barrels of spirits said spirits were inspected and accepted by a representative of petitioner at Franciscan as produced, said spirits were placed in barrels furnished by petitioner for that purpose, and said barrels of spirits were then stored in bond in Internal Revenue Bonded Warehouse No. 2 of Hedgeside and warehouse receipts issued by Hedgeside to petitioner covering said barrels which warehouse receipts are still held by petitioner;

Between December, 1947 and April, 1948, pursuant to a production contract for grain spirits between Franciscan Farm and Livestock Corp. and petitioner dated October 13, 1947 (Petitioner's Exhibit Nos. 25-A and 25-B), petitioner purchased 900 barrels of said spirits from Franciscan Farm and Livestock Corp., the documentary evidence of said purchase and sale being contained in Petitioner's Exhibit Nos. 51, 64 and 50; concurrently with the purchase and sale of said 900 barrels of spirits, said spirits were inspected and accepted by a representative of petitioner at Franciscan as produced, said spirits were placed in barrels furnished by petitioner for that purpose, and said barrels of spirits were then stored in bond in Internal Revenue Bonded Warehouse No. 111 of Franciscan and covered by warehouse receipts issued by Franciscan to petitioner, and in November and December, 1948, said barrels were transferred in bond to Internal Revenue Bonded Warehouse No. 2 of Hedgeside, as set out in Petitioner's Exhibit Nos. 45 and 51, at which time the warehouse receipts for

said barrels now held by petitioner were issued to petitioner by Hedgeside; a true and correct summary of the evidence of said purchases of the above 1,359 barrels of said spirits from Franciscan is set out in Exhibit "C" hereto which is incorporated herein and made a part hereof for all purposes;

(c) The balance of said 8,933 barrels of whiskey and grain spirits, totalling 2,759 barrels of whiskey, was purchased by petitioner from Heaven Hill Corporation, a California corporation, by an oral contract made between the parties in December, 1947, and performed by the parties in January, 1948, and petitioner is now the holder of warehouse receipts Nos. 3681B, 3682B, 3683B, and 3684B issued by Hedgeside to petitioner covering said whiskey now stored in bond in Internal Revenue Bonded Warehouse No. 2 of Hedgeside; said 2,759 barrels of whiskey was originally produced by Franciscan Farm and Livestock Corp. at its distillery at Yountville, California, and continuously stored in bond since production in Internal Revenue Bonded Warehouse No. 2 of Hedgeside, subject to warehouse receipts issued from time to time to the respective owners by Hedgeside as follows:

Concurrently with its production between October, 1946 and January, 1947, 2,861 barrels of whiskey (of which said 2,759 barrels of whiskey is a part) was sold by Franciscan Farm and Livestock Corp. to Barnhill Distilleries Company, a California corporation, and a wholly-owned subsidiary of Glaser Bros., a California corporation,

pursuant to an oral agreement between the parties; said whiskey was stored in bond in Internal Revenue Bonded Warehouse No. 2 of Hedgeside as produced, and its sale to Barnhill Distilleries Company completed within a few days of production by delivery of Hedgeside warehouse receipts to Barnhill Distilleries Company in exchange for the agreed purchase price of \$162,316.50 which was paid to Franciscan by Glaser Bros., the documentary evidence of said purchase and sale being contained in petitioner's Exhibit No. 7 (invoices, checks and drafts), Petitioner's Exhibit Nos. 2, 3, 4 and 5 (Cancelled warehouse receipts originally issued to Barnhill contained in Hedgeside Warehouse Receipt Book), and Anglo Bank's Exhibit No. 34 [Franciscan Journal]; the parties to said purchase and sale intended to and did effect a transfer of title to said whiskey at the time said warehouse receipts were delivered to Barnhill Distilleries Company; the original purchase price was subsequently reduced to the sum of \$130,951.44 by means of a credit memorandum issued by Franciscan Farm and Livestock Corp. to Barnhill Distilleries Company, as the result of the compromise of a dispute over the transaction which later arose between the parties;

Barnhill Distilleries Company held all of said warehouse receipts covering said 2,861 barrels of whiskey from January, 1947, the date of issue of the last of said receipts, until January 3, 1948, except for two barrels which were disposed of by

Barnhill during the period; on January 3, 1948, Barnhill exchanged said receipts covering 2,759 barrels of said whiskey for four negotiable warehouse receipts of Hedgeside, Warehouse Receipt Nos. 384, 385, 386 and 387 (Petitioner's Exhibit No. 1), and in accordance with an oral agreement of sale with Heaven Hill Corporation delivered said four negotiable warehouse receipts covering said 2,859 barrels of said whiskey to Heaven Hill Corporation in exchange for the purchase price of \$131,983.70 (Petitioner's Exhibit Nos. 8 and 9);

Pursuant to said oral agreement of sale between Heaven Hill Corporation and Petitioner, Heaven Hill Corporation immediately delivered said four negotiable warehouse receipts covering said 2,859 barrels of whiskey to Petitioner in exchange for the purchase price for said whiskey to Petitioner of \$150,314.77 (Petitioner's Exhibit Nos. 11A, 11B and 11C);

Petitioner held said four negotiable warehouse receipts covering said 2,859 barrels of whiskey from January to December, 1948, except that during this period 100 barrels of said whiskey covered by warehouse receipt No. 384 were withdrawn by Petitioner; on December 22, 1948, Petitioner exchanged said four negotiable warehouse receipts, covering 2,759 barrels of said whiskey, for non-negotiable warehouse receipts of Hedgeside, Nos. 3681B, 3682B, 3683B and 3684B (Petitioner's Exhibit No. 26), which warehouse receipts are now and ever since said date have been held by Petitioner;

A true and correct summary of the evidence of

said transactions covering said 2,759 barrels of whiskey is set out in Exhibit "D" hereto which is incorporated herein and made a part hereof for all purposes;

5. Anglo Bank is the holder of duplicate warehouse receipts covering 3,333 barrels of said 8,933 barrels of whiskey and spirits, said duplicate receipts having been pledged by Hedgeside to secure loans made by Anglo Bank to Hedgeside, as follows:

(a) On January 4, 1949, Hedgeside pledged to Anglo Bank as security for a loan its warehouse receipt No. 3689B purporting to cover 574 barrels of the 3,191 barrels of grain spirits described in paragraph 4-A of the above findings of fact, which spirits had been purchased by Petitioner from Hedgeside between October, 1947 and March, 1948; at the time of said pledge to Anglo Bank, Petitioner was the holder of valid Hedgeside warehouse receipts for the same 574 barrels of grain spirits, as follows:

No. of Barrels and Serial Numbers	No. and Date of Issue of Petitioner's Warehouse Receipts	No. and Date of Issue of Anglo Bank's Warehouse Receipts
69 70228-296	3525B (11-24-47)	3689B (1-5-49)
27 70942-968	3538B (Undated)	
50 70969-71018	3539B (12-8-47)	
74 71069-71142	3541B (12-10-47)	
96 71143-71238	3543B (12-11-47)	
85 71239-71323	3544B (12-12-47)	
150 71324-71473	3545B (12-15-47)	
23 71474-71496	3545B (12-15-47)	

574 Barrels

All of the above warehouse receipts now held by Petitioner for said 574 barrels of spirits were issued by Hedgeside and delivered by it to Petitioner pursuant to said production contract described in 4 (a) hereof more than one year prior to the issue and pledge by Hedgeside of receipt No. 3689-B to Anglo Bank [Receipt No. 3538B, undated, was delivered to Petitioner on or about December 9, 1947]; said warehouse receipts of Petitioner for said 574 barrels were delivered to Petitioner through Anglo Bank, the bank acting as collection agent for Hedgeside and delivering said warehouse receipts to Petitioner in exchange for payment of Hedgeside drafts, and Anglo Bank had actual knowledge of said delivery to Petitioner of said warehouse receipts covering said 574 barrels to Petitioner;

Petitioner at all times since delivery to it of said warehouse receipts retained and held all the indicia of ownership of said 574 barrels and Hedgeside was at no time clothed with the apparent ownership of said property but held only the naked possession thereof in its capacity as a bonded warehouseman; said warehouse receipt No. 3689-B was issued and pledged by Hedgeside to Anglo Bank without Petitioner's knowledge, authority, or consent, and Anglo Bank in accepting said warehouse receipt relied solely on the mere possession of said property by Hedgeside as the proprietor of a government bonded warehouse; in accepting said warehouse receipt Anglo Bank was not misled by any

act or omission on the part of Petitioner or of anyone acting on behalf of Petitioner;

(b) Between June 17, 1947 and September 16, 1948, Hedgeside pledged to Anglo Bank as security for loans to Hedgeside its warehouse receipts purporting to cover said 2,859 barrels of whiskey, described in paragraph 4 (c) hereof, which whiskey had been produced by Franciscan Farm and Livestock Corp. and sold by it to Barnhill Distilleries Company as produced; the numbers and dates of issues of said warehouse receipts pledged by Hedgeside to Anglo Bank are as follows:

No.	Date of Issue	No. of Barrels
3469-B	6-17-47	225
3470-B	6-17-47	735
3472-B	7-30-47	100
3474-B	9-10-47	100
3475-B	9-16-47	200
3476-B	9-16-47	200
3477-B	10-22-47	200
3548-B	12-17-47	200
3552-B	9-16-48	899
		<hr/> 2,859

As set out in said paragraph 4 (c) hereof and as summarized by Exhibit "D" hereto, at the time of said purported pledges to Anglo Bank, Petitioner or Petitioner's predecessors in title were the holders of valid warehouse receipts covering said 2,859 barrels of whiskey, then stored in Hedgeside's Internal Revenue Bonded Warehouse No. 2, the last warehouse receipt for said whiskey having been issued to Barnhill Distilleries Company more

than four months before the first warehouse receipt for said whiskey was pledged to Anglo Bank;

Petitioner, or petitioner's predecessors in title, Heaven Hill Corporation and Barnhill Distilleries Company, at all times since delivery to them of their warehouse receipts covering said whiskey, retained and held all the indicia of ownership of said whiskey and Hedgeside was at no time clothed with the apparent ownership of said property but held only the naked possession thereof in its capacity as a bonded warehouseman; the warehouse receipts listed above held by Anglo Bank were issued and pledged by Hedgeside to Anglo Bank without the knowledge, authority or consent of Franciscan Farm and Livestock Corp., the original producer and owner of said whiskey, and without the knowledge, authority or consent of said subsequent purchasers of said whiskey and holders of valid warehouse receipts therefor, Barnhill Distilleries Company, Heaven Hill Corporation, and Petitioner, and Anglo Bank in accepting its said warehouse receipts from Hedgeside relied solely on the mere possession of said whiskey by Hedgeside as proprietor of a government bonded warehouse; in accepting its said warehouse receipts Anglo Bank was not misled or deceived by and did not suffer detriment because of any act or omission on the part of Petitioner or of Petitioner's predecessors in title Barnhill Distilleries Company, Heaven Hill Corporation, and Franciscan Farm and Livestock Corp.

6. At all times herein mentioned up to the date

of filing of said involuntary petition in bankruptcy, Hedgeside's Internal Revenue Bonded Warehouse No. 2 held a permit to operate said warehouse duly issued by the United States, Alcohol Tax Unit Form 27-D (Petitioner's Exhibit Nos. 46 and 47), and at all of said times held a "Distilled Spirits Manufacturer's License" and a "Public Warehouse" license duly issued by the Board of Equalization of the State of California; at all of said times Hedgeside did not advertise for or solicit customers for the storing of spirits and whiskey and did not regularly store goods for the public generally, but in the regular course of its business Hedgeside stored in bond whiskey and spirits produced in its own distillery and whiskey and spirits owned by a limited number of persons licensed to deal in bulk whiskey and spirits and with whom Hedgeside did business, charging a reasonable rate in the regular course of business for such storage.

7. The principal place of business of Hedgeside and its Internal Revenue Bonded Warehouse No. 2 at all times herein mentioned was located at Napa, California, and at all of said times copies of warehouse receipts issued by Hedgeside covering whiskey and spirits stored in bond in its Internal Revenue Bonded Warehouse No. 2 were kept at said principal place of business and at said warehouse.

8. At all times herein mentioned during the year 1948 Anglo Bank was not a creditor of Franciscan Farm and Livestock Corp., a corporation.

From the foregoing Findings of Fact the Court makes its

CONCLUSIONS OF LAW

1. At all times hereinabove mentioned and in each of said transactions wherein Petitioner purchased said whiskey and spirits, Petitioner was and is a bona fide purchaser of said whiskey and spirits totalling 8,933 barrels.

2. At the time of said pledge by Hedgeside to Anglo Bank of duplicate warehouse receipts for said 574 barrels of spirits hereinabove described, Hedgeside was not the owner of said spirits nor did it have any right, title or interest in or to said spirits except as bailee for Petitioner, who was at said time the owner of said spirits and the holder of valid warehouse receipts for the same; Anglo Bank has no right, title or interest whatsoever in or to said 574 barrels of spirits by virtue of said pledge or said duplicate warehouse receipts, or otherwise.

3. Hedgeside was at no time the owner of said 2,759 barrels of whiskey hereinabove described, nor did Hedgeside have any right, title or interest to said whiskey except as bailee for the true owners thereof, and said pledge by Hedgeside to Anglo Bank of duplicate warehouse receipts for said whiskey carried no title to or interest in said whiskey to Anglo Bank; prior to said pledge of said duplicate warehouse receipts said whiskey consisting of said 2,859 barrels had been sold by Franciscan Farm and Livestock Corp., the producer and original owner of said whiskey, to Barnhill Distilleries

Company, which thereby became the owner of said whiskey and which passed good title thereto to Heaven Hill Corporation, Petitioner's predecessor in title; Anglo Bank has no right, title or interest whatsoever in or to said whiskey, or any part thereof, by virtue of said pledge or duplicate warehouse receipts, or otherwise, and Anglo Bank has no right, title or interest in or to the balance of said 8,933 barrels of whiskey and spirits, or any part thereof.

4. At all times hereinabove mentioned when whiskey and spirits produced by Franciscan Farm and Livestock Corp. were transferred into storage in Hedgeside's said warehouse concurrently with the sale of said whiskey and spirits, there was an immediate delivery and an actual and continued change of possession of said goods within the meaning of Section 3440 of the Code of Civil Procedure of the State of California.

5. At all times hereinabove mentioned prior to the filing of said involuntary petition in bankruptcy, Hedgeside was a warehouseman as defined in the California Uniform Warehouse Receipts Act, and at all of said times was lawfully engaged in the business of storing goods for profit, and was authorized to and did issue valid warehouse receipts for goods so stored, including said warehouse receipts now held by petitioner for said 8,933 barrels of whiskey and spirits; at all said times Hedgeside

was not a public utility under the Public Utilities Act of California.

6. At all times hereinabove mentioned when Hedgeside issued its warehouse receipts as bailee for said 8,933 barrels of whiskey and spirits stored in its Internal Revenue Bonded Warehouse No. 2, the California Uniform Warehouse Receipts Act was the exclusive statute governing and controlling the transfer of title to said whiskey and spirits and the ownership thereof, for all purposes, and the provisions of Section 3440 of the Code of Civil Procedure of the State of California had and has no application whatsoever to said whiskey and spirits so stored under said warehouse receipts.

7. At all times hereinabove mentioned Hedgeside was the lawful proprietor of a United States Government bonded warehouse pursuant to and authorized by the laws and regulations of the United States, namely, Internal Revenue Bonded Warehouse No. 2; at all times hereinabove mentioned when portions of said 8,933 barrels of whiskey and spirits were stored in the bonded warehouse of Franciscan Farm and Livestock Corp., said corporation was the lawful proprietor of a United States Government bonded warehouse pursuant to and authorized by the laws of the United States, namely, Internal Revenue Bonded Warehouse No. 111; at all of said times the transfer of all or part of said 8,933 barrels of whiskey into bond in said warehouses subjected said whiskey and spirits to

the statutes contained in the Internal Revenue Code of the United States, and to the regulations promulgated thereunder, and said transfers into bond concurrently with the sale of said whiskey and spirits were accompanied by an immediate delivery and an actual and continued change of possession within the meaning of Section 3440 of the Code of Civil Procedure of the State of California.

8. At all times hereinabove mentioned when Hedgeside issued its warehouse receipts to petitioner for all or part of said 8,933 barrels of whiskey and spirits, Hedgeside recognized the conveyance to Petitioner of said goods and confirmed said conveyance by the making of the storage contract contained in said warehouse receipts, and Hedgeside as bailee for Petitioner was and is estopped from disputing Petitioner's title to said goods as against Hedgeside.

9. Said bankrupt, Hedgeside and its estate, and said trustee in bankruptcy, have no right, title or interest whatsoever in or to said 8,933 barrels of whiskey and spirits, or any part thereof, either legal or equitable; Petitioner is the exclusive owner of said 8,933 barrels of whiskey and spirits and is entitled to the immediate possession thereof.

Wherefore, It Is Ordered that Petitioner's said reclamation petition be and the same is hereby granted, and the said trustee is ordered and directed

to forthwith surrender and deliver said 8,933 barrels of whiskey and spirits to Petitioner.

Dated: January 10th, 1952.

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy

[Exhibit A is not reproduced here as it is identical to Exhibit A set out at pages 6-9 of this printed record.]

[Endorsed]: Filed Jan. 10, 1952.

**SUMMARY OF SCHEMPLER DISTILLERS CORPORATION PURCHASES OF SPIRITS GRAIN PRODUCED BY
EDGEWIDE DISTILLERY CORPORATION AND NOW CARRIED IN STORAGE IN I. B. N. #2 AT WAPA, CALIFORNIA**

Warehouse Receipts			Invoices (Issued by Edgewide Distillery Corporation)			Payments by Schempler Distillers Corporation				
Number	Date	Quantity (in barrels)	Serial Numbers	Number	Date	Quantity (in barrels)	Serial Numbers	Voucher Check No.	Date	Drawn to
33648	2/24/47	105 S.O.	62257 - 62361	882	2/24/47	150 S.O.	62212 - 62361	2/47 \$5,896.54		
33651	2/25/47	38	62462 - 62499	884	2/25/47	38	62462 - 62499	2/47 1,217.03	3-80937	Bankers Trust Co., re - Edgewide Distillery Corporation
33663	2/25/47	100	62562 - 62461	883	2/25/47	100	62562 - 62461	2/47 3,200.23		
33668	3/21/47	44	64201 - 64244	909	3/21/47	51	64194 - 64244	3/47 1,681.39		
33691	3/24/47	94	64245 - 64338	910	3/24/47	94	64245 - 64338	3/47 3,013.84		
33693	3/25/47	38	64339 - 64376	915	3/25/47	38	64339 - 64376	3/47 1,227.52	3-90755	
33698	3/25/47	56	64377 - 64434	916	3/25/47	56	64377 - 64434	3/47 1,887.67		
33706	3/25/47	59	64435 - 64493	917	3/25/47	59	64435 - 64493	3/47 1,913.11		
33778	3/26/47	96	64494 - 64569	918	3/26/47	96	64494 - 64569	3/47 3,108.33	3-90890	
34018	3/27/47	90	64570 - 64679	919	3/27/47	90	64570 - 64679	3/47 2,872.83	4-90934	
34058	3/31/47	92	64680 - 64771	921	3/31/47	92	64680 - 64771	3/47 2,972.79		
34068	4/2/47	100	64772 - 64871	925	4/2/47	100	64772 - 64871	3/47 3,243.92		
34098	4/2/47	49	64872 - 64919	926	4/2/47	48	64872 - 64919	3/47 1,597.99		
34098	4/2/47	50	64920 - 64969	927	4/2/47	50	64920 - 64969	3/47 1,620.91		
34108	4/2/47	44	64970 - 65013	928	4/2/47	44	64970 - 65013	3/47 1,427.37		
34128	4/2/47	90	65014 - 65103	929	4/2/47	90	65014 - 65103	3/47 2,969.89	4-91467	
34188	4/7/47	10	65104 - 65113	931	4/7/47	10	65104 - 65113	3/47 326.08	4-91700	
34208	4/9/47	21	65114 - 65141	933	4/9/47	21	65114 - 65141	3/47 1,690.26	4-91837	
34358	4/17/47	80	65921 - 65008	956	5/6/47	80	65921 - 65008	3/47 2,994.60	5-92861	
Total		1,293 S.O.								

Spirits Produced and Purchased under the Terms of a Contract dated October 13, 1947								
Number	Date	Quantity (in barrels)	Serial Numbers	Invoice Inspection	Amount	No.	Date	Drawn to
34608	10/27/47	50 S.O.	68747 - 68796	10/47	1,780.50	11-1176	11/5/47	
34813	10/27/47	20	68797 - 68816	10/47	712.08			
34823	10/28/47	16	68817 - 68832	10/47	576.26			
34843	10/28/47	50	68833 - 68882	10/47	1,789.03			
34868	10/29/47	35	68883 - 68917	10/47	1,250.88	S.F. 11-34	11/3/47	Angle California Bank Re Edgewide Distillery Corporation
35058	11/17/47	56	69793 - 69911	11/47	4,215.77	S.F. 11-690	11/20/47	
35098	11/19/47	81	69912 - 70065	11/47	2,864.25	S.F. 11-733	11/20/47	
35108	11/20/47	70	70066 - 70135	11/47	2,475.55	S.F. 11-818	11/25/47	
35258	11/24/47	69	70228 - 70286	11/47	2,436.99	S.F. 11-893	11/28/47	
35298	11/28/47	137	70350 - 70486	11/47	4,890.76	S.F. 12-22	12/28/47	
35308	11/28/47	69	70487 - 70595	12/47	2,427.64	S.F. 12-18	12/2/47	
35388	12/8/47	27	70906 - 70968	12/47	2,293.12	S.F. 12-195	12/9/47	
35418	12/10/47	74	70969 - 71018	12/47	1,774.32	S.F. 12-284	12/10/47	
35438	12/11/47	74	71069 - 71182	12/47	2,610.76	S.F. 12-383	12/11/47	
35438	12/11/47	96	71183 - 71238	12/47	3,536.68	S.F. 12-496	12/16/47	
35448	12/12/47	85	71239 - 71323	12/47	3,014.20	S.F. 12-495	12/16/47	

Warehouse Receipt	Quantity	Number	Date	(in Barrels)	Serial Numbers	Inspection	Date	Amount	Voucher	Check	Drawn to
3457B	173	71324	12/15/47	173	71324 - 71396	12/47	6,153.42	S.F. 12-798	08596	12/22/47	Anglo California Bank Re
3457B	9	72880	2/16/48	82	72880 - 72888	2/48	3,338.64	S.F. 2-771	10031	2/19/48	Hedges Distillery
3457B	76	72889	2/16/48	76	72889 - 72964	2/48	3,051.54	S.F. 2-808	10077	2/19/48	Corporation
3457B	53	72965	2/17/48	53	72965 - 73047	2/48	3,396.73	S.F. 2-916	10929	2/25/48	
3457B	67	73173	2/22/48	67	73173 - 73239	2/48	3,259.91	S.F. 2-972	11147	2/27/48	
3457B	81	73240	2/24/48	81	73240 - 73269	2/48	3,042.16	S.F. 2-972	11148	2/27/48	
3457B	56	73394	2/25/48	56	73394 - 73463	2/48	3,259.91	S.F. 3-430	11707	3/12/48	
3457B	11	73910	3/8/48	11	73910 - 73920	3/48	2,183.20	S.F. 3-567	11899	3/12/48	
3457B	86	73971	3/9/48	86	73971 - 74056	3/48	3,232.40	S.F. 3-567	11900	3/12/48	
3457B	31	74057	3/10/48	31	74057 - 74119	3/48	2,373.77	S.F. 3-809	12105	3/18/48	
3457B	85	74237	3/16/48	85	74237 - 74369	3/48	3,195.90	S.F. 3-807	12103	3/18/48	
3457B	110	74497	3/17/48	110	74497 - 74596	3/48	3,629.88	S.F. 3-989	12296	3/24/48	
3457B	80	74643	3/22/48	80	74643 - 74722	3/48	3,005.10	S.F. 3-1077	12371	3/26/48	
3457B	91	74723	3/23/48	91	74723 - 74813	3/48	3,425.38	S.F. 3-1076	12370	3/26/48	
3457B	84	74862	3/24/48	84	74862 - 74945	4/48	3,186.30	S.F. 4-421	13067	4/12/48	
3457B	31	75946	4/9/48	31	75946 - 75955	4/48	3,021.27	S.F. 4-461	13112	4/13/48	
3457B	75	75686	4/12/48	75	75686 - 75696	4/48	3,178.78	S.F. 4-999	13144	4/18/48	
3457B	84	75657	4/15/48	84	75657 - 75731	4/48	2,832.37	S.F. 4-707	13313	4/19/48	
3457B	25	75816	4/15/48	25	75816 - 75940	4/48	3,164.46	S.F. 4-706	13312	4/19/48	
3457B	59	75941	4/20/48	59	75941 - 75982	4/48	944.69	S.F. 4-746	13355	4/19/48	
3457B	55	76000	4/22/48	55	76000 - 76024	4/48	2,208.75	S.F. 4-932	13522	4/23/48	
3457B	86	76294	4/23/48	86	76294 - 76379	4/48	2,222.75	S.F. 4-1015	13576	4/27/48	
3457B	25	76449	5/6/48	25	76449 - 76473	4/48	2,074.72	S.F. 4-1016	13577	4/27/48	
3457B	100	71952	12/1/48	100	71952 - 71951	5/48	3,243.50	S.F. 5-222	14077	5/7/48	
3457B	189	71952	12/2/48	189	71952 - 72100	12/47	3,052.91	S.F. 5-368	14253	5/12/48	
3457B	1	72199	12/2/48	1	72199	12/47	2,475.78	S.F. 12-986	08746	12/30/47	
3457B	3	71798	12/3/48	3	71798 - 71800	12/47	3,274.90	S.F. 12-1092	08989	1/2/48	
3457B	59	72800	12/3/48	59	72800 - 72856	12/47	1,451. below	S.F. 1-45	08969	1/6/48	
3457B	83	74913	12/3/48	83	74913 - 74995	12/47	2,484.73	S.F. 12-892	08712	12/29/47	
3457B	83	74913	12/3/48	83	74913 - 74995	12/47	2,109.41	S.F. 1-45	08969	1/6/48	
3457B	83	74913	12/3/48	83	74913 - 74995	3/48	3,117.58	S.F. 3-1288	12546	3/31/48	
Total											

Total 3,191 S.O.

Designates quantities purchased on original invoice which differ from remaining quantities on hand per warehouse receipts.

S.O. Designates "Spirits Grain."

(Invoices Issued by Hedgeside Distillery Corporation)

Warehouse Receipts

Number	Date	Quantity (in barrels)	Serial Numbers
3511B	11/20/47	45 kb.	349-002
3512B	11/20/47	40 "	3777 - 3816
3513B	11/20/47	40 "	3936 - 3954
3671B	12/6/48	25 S.O.	5735 - 5819
3672B	12/7/48	15 "	5837 - 5851
3673B	12/7/48	2 "	5852 - 5853
3673B	12/7/48	17 "	5888 - 5904
3673B	12/7/48	18 "	5940 - 5957
3673B	12/7/48	60 "	5976 - 6635

Total 331

Invoices (Issued by Hedgeside Distillery Corporation)

Number	Date	Quantity (in barrels)	Serial Numbers	Inspection Date	Amount
1075	11/20/47	45 kb.	349 - 392	11/46	1,711.38
1076	11/20/47	40 "	3777 - 3816	2/47	3,566.64
1076	11/20/47	40 "	3936 - 3954	2/47	3,408.97
1077	11/20/47	25 S.O.	5735 - 5819	4/47	3,408.97
1078	11/20/47	15 "	5837 - 5851	5/47	4,481.26
1078	11/20/47	2 "	5852 - 5853	5/47	
1078	11/20/47	17 "	5888 - 5904	5/47	
1078	11/20/47	18 "	5940 - 5957	5/47	
1078	11/20/47	60 "	5976 - 6635	5/47	

Payments by Schenley Distillers Corporation

Voucher No.	Check No.	Date	Drawn to
S.F. 11-816	07459	11/25/47	Anglo California Bank Re -
S.F. 11-884	07599	11/28/47	Hedgeside Distillery Corporation "
S.F. 11-817	07460	11/25/47	"
S.F. 11-822	07465	11/25/47	"

SUMMARY OF SCHEMELY DISTILLERS CORPORATION PURCHASES OF SPIRITS GRAIN AND WHEAT PRODUCED AT FRANCISCAN FARM AND LIVESTOCK COMPANY AND NOW CARRIED IN STORAGE IN L. I. S. V. #2 AT M. A. P. S., CALIFORNIA

Payments by Schemely Distillers Corporation

Warehouse Receipts		Invoices		Inspection		Voucher		Check		Drawn to		
Number	Date (in barrels)	Quantity (in barrels)	Serial Numbers	Number	Date	Serial Numbers	Amount	No.	No.	Date		
3671B	3/16/47	42 S.O.	4351 - 4392	140	3/19/47	4351 - 4392	42 S.O.	3/47	\$1,355.83	N.Y. 3-90391	3/24/47	National City Bank, N.Y. Re - Franciscan Farm & Livestock Co.
3671B	3/19/47	38	4393 - 4472	141	3/19/47	4393 - 4472	38	3/47	1,226.56	N.Y. 3-90743	3/31/47	"
3671B	3/21/47	42	4473 - 4508	142	3/21/47	4473 - 4508	42	3/47	1,364.62	N.Y. 3-90743	3/31/47	"
3671B	3/21/47	36	4509 - 4554	143	3/21/47	4509 - 4554	36	3/47	1,170.92	N.Y. 3-90899	4/1/47	"
3671B	3/24/47	46	4555 - 4580	145	3/24/47	4555 - 4580	46	3/47	1,486.24	N.Y. 3-90899	4/1/47	"
3671B	3/24/47	26	4581 - 4626	146	3/25/47	4581 - 4626	26	3/47	1,844.14	N.Y. 4-91000	4/2/47	"
3671B	3/26/47	46	4627 - 4672	147	3/26/47	4627 - 4672	46	3/47	1,487.16	"	"	"
3671B	3/27/47	27	4673 - 4678	148	3/27/47	4673 - 4678	27	3/47	810.17	"	"	"
3671B	3/27/47	25	4679 - 4709	149	3/28/47	4679 - 4709	25	3/47	1,001.15	N.Y. 4-91283	4/7/47	"
3671B	3/28/47	31	4710 - 4740	150	3/28/47	4710 - 4740	31	3/47	1,066.16	"	"	"
3671B	3/28/47	31	4741 - 4777	151	3/28/47	4741 - 4777	31	3/47	1,192.71	"	"	"
3671B	3/31/47	37	4778 - 4809	152	3/31/47	4778 - 4809	37	3/47	1,032.57	N.Y. 4-91344	4/8/47	Managers Trust Co., N.Y. Re - Franciscan Farm & Livestock Co.
3671B	4/1/47	32		154	4/1/47		32	3/47				

Total 459

Spirits Produced and Purchased under the terms of a Contract dated October 13, 1947 (Invoices Issued by Franciscan Farm and Livestock Company)

Number	Date	Quantity	Serial Numbers	Number	Date	Serial Numbers	Amount	Voucher No.	Check No.	Date	Drawn to		
3671B	12/7/48	3 S.O.	6239 - 6241	197	11/10/47	6239 - 6241	3 S.O.	11/47	\$ 1,530.24	S.F. 11-879	07555	11/28/47	Anglo California Bank Re - Franciscan Farm & Livestock Co.
3671B	12/8/48	68	6242 - 6309	198	11/10/47	6242 - 6281	40	11/47	1,004.14	S.F. 11-878	07554	11/28/47	"
3671B	12/8/48	19	6311 - 6369	186	11/10/47	6282 - 6309	28	11/47	676.06	S.F. 11-860	07154	11/28/47	"
3671B	12/9/48	23	6445 - 6472	192	11/13/47	6351 - 6369	19	11/47	1,464.19	S.F. 11-732	07364	11/24/47	"
3671B	12/9/48	44	6492 - 6538	194	11/18/47	6445 - 6472	33	11/47					
3671B	"	26	6560 - 6587	196	11/20/47	6492 - 6538	26	"	1,572.29	S.F. 11-819	07462	11/25/47	"
3671B	12/10/48	20	6588 - 6607	196	11/24/47	6492 - 6587	28	"	1,716.09	S.F. 11-866	07557	11/28/47	"
3671B	"	32	6966 - 6997	220	12/15/47	6588 - 6607	20	"					
3671B	"	48	7031 - 7076	224	12/15/47	6937 - 6973	37	12/47	1,330.36	S.F. 12-674	08516	12/19/47	"
3671B	12/17/48	73	7079 - 7151	224	12/16/47	6974 - 6997	34	12/47	854.57	S.F. 12-671	08913	12/19/47	"
3671B	12/17/48	20 S.O.	7169 - 7188	225	12/16/47	7031 - 7071	41	12/47	1,467.13	S.F. 12-790	08598	12/22/47	"
3671B	"	4	7382 - 7385	229	12/19/47	7072 - 7078	7	12/47	1,443.20	S.F. 12-829	08645	12/23/47	"
3671B	"	3	7388 - 7390	253	2/17/48	7079 - 7103	25	12/47	1,725.20	S.F. 12-901	08711	12/25/47	"
3671B	"	100	7391 - 7490	253	2/23/48	7104 - 7151	48	12/47	712.61	S.F. 12-1089	08896	1/2/48	"
						7189 - 7188	20	12/47	161.13	S.F. 2-733	10932	2/19/48	"
						7382 - 7385	4	2/48	154.43	S.F. 2-913	11105	2/25/48	"
						7388 - 7390	1	"					
						7391	1	"					

Warehouse Receipts

Invoices

Payments by Schenley Distillers Corporation

Warehouse Receipts			Invoices			Payments by Schenley Distillers Corporation							
Number	Date	Quantity (in Barrels)	Serial Numbers	Number	Date	Quantity (in Barrels)	Serial Numbers	Inspection Date	Amount	Voucher No.	Check No.	Date	Drawn to
3677B	12/17/48	50	S.G. 7713 - 7762	254	2/24/48	20	7302 - 7411	2/48	752.52	S.F. 2-973	1147	2/27/48	Anglo California Bank Re -
3680B	12/21/48	50	7763 - 7812	257	2/25/48	21	7412 - 7432	"	796.30	S.F. 2-974	1150	2/27/48	Franciscan Farm and Livestock
3683B	12/22/48	50	7813 - 7862	258	2/26/48	6	7433 - 7460	"	304.61	S.F. 3-11	11317	3/2/48	Company
3685B	"	6	7863 - 7863	259	2/27/48	26	7441 - 7466	"	984.19	S.F. 3-12	11316	3/2/48	"
3687B	12/27/48	12	8109 - 8120	260	2/28/48	24	7467 - 7490	"	912.37	S.F. 3-96	11397	3/3/48	"
3687B	12/27/48	35	9146 - 9180	277	3/16/48	29	7713 - 7741	3/48	1,105.20	S.F. 3-811	12107	3/18/48	"
3687B	12/27/48	35	9146 - 9180	278	3/16/48	11	7742 - 7752	"	415.51	S.F. 3-810	12106	3/18/48	"
3687B	12/27/48	35	9146 - 9180	279	3/17/48	10	7753 - 7762	"	571.98	S.F. 3-806	12102	3/18/48	"
3687B	12/27/48	35	9146 - 9180	279	3/17/48	5	7763 - 7767	"	1,059.40	S.F. 3-896	12182	3/22/48	"
3687B	12/27/48	35	9146 - 9180	280	3/18/48	28	7768 - 7795	"	721.73	S.F. 3-963	12265	3/23/48	"
3687B	12/27/48	35	9146 - 9180	281	3/19/48	17	7796 - 7812	"	910.88	S.F. 3-990	12297	3/24/48	"
3687B	12/27/48	35	9146 - 9180	282	3/22/48	24	7813 - 7814	"	796.68	S.F. 3-991	12297	3/24/48	"
3687B	12/27/48	35	9146 - 9180	283	3/22/48	31	7815 - 7838	"	337.81	S.F. 3-988	12298	"	"
3687B	12/27/48	35	9146 - 9180	284	3/22/48	3	7839 - 7859	"	604.73	S.F. 3-1075	12360	3/26/48	"
3687B	12/27/48	35	9146 - 9180	286	3/24/48	16	7860 - 7862	"	831.57	S.F. 3-1187	12502	3/29/48	"
3687B	12/27/48	35	9146 - 9180	286	3/25/48	22	7863 - 7868	"	751.17	S.F. 3-1244	12532	3/30/48	"
3687B	12/27/48	35	9146 - 9180	288	3/25/48	6	7888 - 7903	"	981.74	S.F. 3-1286	12548	3/31/48	"
3687B	12/27/48	35	9146 - 9180	289	3/26/48	14	7904 - 7925	"	980.74	S.F. 3-1287	12547	3/31/48	"
3687B	12/27/48	35	9146 - 9180	290	3/26/48	14	7926 - 7931	"	1,202.02	S.F. 3-1315	12606	4/1/48	"
3687B	12/27/48	35	9146 - 9180	291	3/29/48	26	7946 - 7971	"	945.47	S.F. 4-68	12676	4/2/48	"
3687B	12/27/48	35	9146 - 9180	292	3/29/48	32	7972 - 7997	"	1,089.14	S.F. 4-157	12789	4/7/48	"
3687B	12/27/48	35	9146 - 9180	292	3/30/48	25	8030 - 8054	"	375.50	S.F. 4-158	12790	4/7/48	"
3687B	12/27/48	35	9146 - 9180	293	4/5/48	27	8082 - 8108	"	752.90	S.F. 4-341	12933	4/2/48	"
3687B	12/27/48	35	9146 - 9180	298	4/5/48	2	8109 - 8110	"	565.38	S.F. 4-340	12938	4/3/48	"
3687B	12/27/48	35	9146 - 9180	299	4/5/48	10	8111 - 8120	"					
3687B	12/27/48	35	9146 - 9180	301	4/7/48	20	8146 - 8165	"					
3687B	12/27/48	35	9146 - 9180	302	4/7/48	15	8146 - 8180	"					

T. tal 990

BEHNSON DISTILLERS CO. (INCORPORATED IN CALIFORNIA) DISTILLERS OF WHISKY
 AND BOTTLED BY THE COMPANY AT THE FOLLOWING ADDRESSES: SHERMAN DISTILLERS CO., FROM THE "MILL" (P.O. BOX 104)
 SAN FRANCISCO, CALIF. AND 1000 MARKET STREET; SHERMAN DISTILLERS CO., 1000 MARKET STREET, SAN FRANCISCO, CALIF. AND 1000 MARKET STREET, SAN FRANCISCO, CALIF.

History of Title to 254 Barrels of Whisky from date of Production by Francisco Farm and Livestock Co. to the ownership by
 Schedule Distillers Corp. as evidenced by invoices from the producer and by Warehouse Receipts covering all
 transactions from the date of initial storage in I.R.M. No. 2 to the present date

Serial Number	Quantity	Production Date	Invol. No.	Invoice Date	Date of Payment	Number	Date	Warehouse Receipts Issued	Number	Date	
1	28	10/23/46	44	"	10/23/46			No-Negotiable Warehouse Receipts issued to Schedule Distillers Corp. by Francisco Farm & Livestock Co. to Burnhill Distillers Co. to cover sale of merchandise			
2	35	10/24/46	"	"	"	3126B	10/23/46	Non-Negotiable Warehouse Receipts issued to Schedule Distillers Co. by Francisco Farm & Livestock Co. to Burnhill Distillers Co. to cover sale of merchandise			
3	37	10/24/46	"	"	"						
4	7	10/24/46	"	"	"						
5	35	10/24/46	45	10/23/46	10/30/46	3126B	10/23/46	Non-Negotiable Warehouse Receipts issued to Schedule Distillers Co. by Francisco Farm & Livestock Co. to Burnhill Distillers Co. to cover sale of merchandise			
6	43	10/24/46	46	10/23/46	10/31/46	3200B	10/23/46	Non-Negotiable Warehouse Receipts issued to Schedule Distillers Co. by Francisco Farm & Livestock Co. to Burnhill Distillers Co. to cover sale of merchandise			
7	43	10/24/46	47	10/23/46	10/31/46	3203B	10/23/46	Non-Negotiable Warehouse Receipts issued to Schedule Distillers Co. by Francisco Farm & Livestock Co. to Burnhill Distillers Co. to cover sale of merchandise			
8	32	10/24/46	48	10/23/46	11/1/46	3204B	10/23/46	Non-Negotiable Warehouse Receipts issued to Schedule Distillers Co. by Francisco Farm & Livestock Co. to Burnhill Distillers Co. to cover sale of merchandise			
9	56	10/24/46	49	10/23/46	11/5/46	3206B	10/23/46	Non-Negotiable Warehouse Receipts issued to Schedule Distillers Co. by Francisco Farm & Livestock Co. to Burnhill Distillers Co. to cover sale of merchandise			
10	31	10/24/46	50	10/23/46	11/12/46	3211B	10/23/46	Non-Negotiable Warehouse Receipts issued to Schedule Distillers Co. by Francisco Farm & Livestock Co. to Burnhill Distillers Co. to cover sale of merchandise			
11	31	10/24/46	51	10/23/46	11/7/46	3213B	10/23/46	Non-Negotiable Warehouse Receipts issued to Schedule Distillers Co. by Francisco Farm & Livestock Co. to Burnhill Distillers Co. to cover sale of merchandise			
12	37	10/24/46	52	10/23/46	11/12/46	3214B	10/23/46	Non-Negotiable Warehouse Receipts issued to Schedule Distillers Co. by Francisco Farm & Livestock Co. to Burnhill Distillers Co. to cover sale of merchandise			
13	43	10/24/46	53	10/23/46	11/15/46	3215B	10/23/46	Non-Negotiable Warehouse Receipts issued to Schedule Distillers Co. by Francisco Farm & Livestock Co. to Burnhill Distillers Co. to cover sale of merchandise			
14	36	10/24/46	54	10/23/46	11/15/46	3216B	10/23/46	Non-Negotiable Warehouse Receipts issued to Schedule Distillers Co. by Francisco Farm & Livestock Co. to Burnhill Distillers Co. to cover sale of merchandise			
15	32	10/24/46	55	10/23/46	11/19/46	3218B	10/23/46	Non-Negotiable Warehouse Receipts issued to Schedule Distillers Co. by Francisco Farm & Livestock Co. to Burnhill Distillers Co. to cover sale of merchandise			
16	39	10/24/46	56	10/23/46	11/19/46	3218B	10/23/46	Non-Negotiable Warehouse Receipts issued to Schedule Distillers Co. by Francisco Farm & Livestock Co. to Burnhill Distillers Co. to cover sale of merchandise			
17	41	10/24/46	57	10/23/46	11/18/46	3222B	10/23/46	Non-Negotiable Warehouse Receipts issued to Schedule Distillers Co. by Francisco Farm & Livestock Co. to Burnhill Distillers Co. to cover sale of merchandise			
18	41	10/24/46	58	10/23/46	11/19/46	3224B	10/23/46	Non-Negotiable Warehouse Receipts issued to Schedule Distillers Co. by Francisco Farm & Livestock Co. to Burnhill Distillers Co. to cover sale of merchandise			
Spirits Grain											
993	1	11/13/46	59	11/13/46	11/21/46	3226B	11/13/46	Non-Negotiable Warehouse Receipts issued to Schedule Distillers Co. by Francisco Farm & Livestock Co. to Burnhill Distillers Co. to cover sale of merchandise			
Whisky											
994-1034	41	11/13/46	59	11/13/46	11/21/46	3226B	11/13/46	Non-Negotiable Warehouse Receipts issued to Schedule Distillers Co. by Francisco Farm & Livestock Co. to Burnhill Distillers Co. to cover sale of merchandise			
1035-1076	42	11/13/46	60	11/20/46	11/21/46	3227B	11/20/46	Non-Negotiable Warehouse Receipts issued to Schedule Distillers Co. by Francisco Farm & Livestock Co. to Burnhill Distillers Co. to cover sale of merchandise			
1077-1116	40	11/13/46	61	11/21/46	11/25/46	3228B	11/21/46	Non-Negotiable Warehouse Receipts issued to Schedule Distillers Co. by Francisco Farm & Livestock Co. to Burnhill Distillers Co. to cover sale of merchandise			
1117-1200	44	11/13/46	62	11/22/46	11/29/46	3231B	11/22/46	Non-Negotiable Warehouse Receipts issued to Schedule Distillers Co. by Francisco Farm & Livestock Co. to Burnhill Distillers Co. to cover sale of merchandise			
1161-1200	40	11/13/46	63	11/25/46	11/29/46	3232B	11/25/46	Non-Negotiable Warehouse Receipts issued to Schedule Distillers Co. by Francisco Farm & Livestock Co. to Burnhill Distillers Co. to cover sale of merchandise			
1201-1244	44	11/13/46	64	11/26/46	11/29/46	3234B	11/26/46	Non-Negotiable Warehouse Receipts issued to Schedule Distillers Co. by Francisco Farm & Livestock Co. to Burnhill Distillers Co. to cover sale of merchandise			
1245-1275	31	11/13/46	65	11/27/46	11/29/46	3235B	11/27/46	Non-Negotiable Warehouse Receipts issued to Schedule Distillers Co. by Francisco Farm & Livestock Co. to Burnhill Distillers Co. to cover sale of merchandise			
1276-1303	28	11/13/46	57	11/27/46	11/29/46	3237B	11/27/46	Non-Negotiable Warehouse Receipts issued to Schedule Distillers Co. by Francisco Farm & Livestock Co. to Burnhill Distillers Co. to cover sale of merchandise			

EXHIBIT D

Warehouse Receipts Issued by Schedule Distillers Co. to Francisco Farm and Livestock Co. to the ownership by
 Distillery Corp. to the Anglo California Bank as collateral for loans to Schedule side.
 December 22, 1943

Warehouse Receipts Issued by Schedule Distillers Co. to Francisco Farm and Livestock Co. to the ownership by
 Distillery Corp. to the Anglo California Bank as collateral for loans to Schedule side.
 December 22, 1943

Inventory of Title to 2659 Barrels of Whisky from dates of production by Franciscan Farm and Livestock Co. to the extent, by Scheele Distillers Corp. as evidenced by invoices from the producer andy arrears. Receipts covering all transactions from the date of initial storage in I. S. W. Co. to the present date.

Invoices issued by Franciscan Farm & Livestock Co. to Serrnill Distill-er Co. to cover sale of merchandise

Non-Negotiable Warehouse Receipts Issued to Serrnill Distilleries Co. by Hedge Distillery Corp. when Merchandise was placed in Storage in I. R. B. W. No. 2 on Hedge- side premises at Hayes, California.

Negotiable Warehouse Receipts Issued to Serrnill Distilleries Co. by Hedge Distillery Corp. when sale was made to Eaves Bill Corp. by Serrnill Distilleries Co. (non-neg- receipts were cancelled December 1, 1943)

Serial Numbers	Production Quantity	Production Date	Invoice No.	Invoice Date	Date of Payment	Number	Date	Number	Date
1304-1340	37	12/6/46	72	12/6/46	12/12/46	2842B	12/6/46	3476A	7/3/47
1341-1378	39	12/7/46	73	12/7/46	12/12/46	3243B	12/9/46	(100 Barrels)	
1379-1403	25	12/9/46	74	12/9/46	12/12/46	3245B	12/9/46	(100 Barrels)	
1404-1417	14	12/9/46							
1418-1457	39	12/11/46	75	12/11/46	12/12/46	3250B	12/11/46	3476A	7/10/47
1458-1477	41	12/11/46	76	12/11/46	12/17/46	3251B	12/11/46	(100 Barrels)	
1478-1503	6	12/12/46	77	12/13/46	12/16/46	3254B	12/13/46		
1504-1535	32	12/13/46							
1536-1578	43	12/14/46	78	12/13/46	12/16/46	3255B	12/13/46		
1579-1616	38	12/14/46	79	12/14/46	12/19/46	3258B	12/16/46		
1617-1660	44	12/16/46	80	12/16/46	12/19/46	3259B	12/16/46		
1661-1677	37	12/17/46	81	12/17/46	12/20/46	3261B	12/17/46		
1678-1703	6	12/18/46	82	12/18/46	12/20/46	3263B	12/18/46		
1704-1743	40	12/19/46							
1744-1783	40	12/19/46	83	12/20/46	12/23/46	3266B	12/20/46	3683B	12/22/46
1784-1824	41	12/20/46	84	12/20/46	12/28/46	3269B	12/20/46	(862 Barrels)	
1825-1867	39	12/21/46	85	12/21/46	12/28/46	3270B	12/23/46		
1868-1903	40	12/23/46	86	12/23/46	12/28/46	3272B	12/23/46		
1904-1905	6								
1910-1941	38	12/24/46	88	12/26/46	12/30/46	3275B	12/26/46		
1942-1977	50	12/24/46	89	12/27/46	12/30/46	3276B	12/27/46		
1978-2036	33	12/27/46	90	12/27/46	1/6/47	3285B	12/27/46		
2037-2050	4	12/28/46	94	12/30/46	12/31/46	3280B	12/30/46		
2051-2103	13	12/30/46	91	12/30/46	12/31/46	3281B	12/30/46		
2104-2130	27	12/31/46							
2131-2157	27	12/31/46	92	12/31/46	1/6/47	3286B	12/31/46		
2158-2185	28	1/2/47	93	1/2/47	1/6/47	3287B	1/2/47		
2186-2215	30	1/2/47	96	1/3/47	1/6/47	3290B	1/3/47		
2216-2242	27	1/3/47	96	1/3/47	1/6/47	3291B	1/3/47		
2243-2269	27	1/3/47	97	1/3/47	1/7/47	3293B	1/3/47		
2270-2303	34	1/4/47	98	1/6/47	1/7/47	3294B	1/6/47		
2304-2306	3								
2307-2333	27	1/6/47	99	1/6/47	1/7/47	3295B	1/6/47		
2334-2351	18	1/6/47	101	1/7/47	1/20/47	3299B	1/7/47		
2352-2389	38	1/7/47	102	1/7/47	1/20/47	3300B	1/7/47		
2390-2444	55	1/8/47	103	1/8/47	1/20/47	3303B	1/8/47		
2445-2492	38	1/9/47	104	1/10/47	1/31/47	3304B	1/10/47		
2493-2509	27	1/10/47	105	1/10/47	1/31/47	3306B	1/10/47		

[Title of District Court and Cause.]

PETITION FOR REVIEW

To the Honorable Bernard J. Abrott, Referee in
Bankruptcy:

The petition of Charles W. Ebnother, Trustee in Bankruptcy of the above bankrupt, and The Anglo California National Bank of San Francisco, a national banking association, respectfully represents:

1. Your petitioners are aggrieved by the Order herein of the Honorable Bernard J. Abrott, Referee in Bankruptcy, dated January 10, 1952, a copy of which order is annexed hereto, marked "Exhibit A," and made a part hereof.

2. Said order specifies that the reclamation petitioner, Schenley Industries, Inc., is the owner and entitled to the immediate possession of 8,933 barrels of whiskey and grain spirits found in the possession of the bankrupt Hedgeside as of the date of bankruptcy. As to all of said property the reclamation petitioner holds documents purporting on their face to be "warehouse receipts." Undersigned petitioner, the Trustee in Bankruptcy, contends that the transfer of said property to said reclamation petitioner is invalid as to creditors of said bankrupt, whom the Trustee represents, since the said reclamation petitioner failed to take possession of said property as required by Section 3440 of the Civil Code of the State of California. Said Trustee further contends that said documents designated "warehouse receipts" are insufficient in law to avoid the effect of said Section 3440 since the issuer of

said receipts was not a "warehouseman" as defined by the Uniform Warehouse Receipts Act and the applicable California statutes and, therefore, not within the exception of Section 3440.5 of said Civil Code. Undersigned petitioner, The Anglo California National Bank of San Francisco, has set up a claim of title in itself as to a portion of said whiskey and spirits due to a pledge made to it by the bankrupt. There is no dispute as to the factual evidence in the record. There is, however, a dispute as to the correct legal conclusions to be adduced from said facts. In addition, said order contains certain findings of fact not supported by any evidence in the record and is objected to on said grounds. The specific objections and reasons therefor follow:

3. The Referee erred in said order as the fourth finding of fact therein (pp. 3-8 of said order) specifies that Schenley Industries, Inc. has held and now holds "warehouse receipts" for 8,933 barrels of whiskey and spirits now stored on the premises of the bankrupt. Said finding is wholly erroneous since although Schenley Industries, Inc. has held, and still holds, documents purported on their face to be "warehouse receipts", none of such documents now or at any time have been valid "warehouse receipts" since none of said documents were issued by a "warehouseman" as defined by the applicable laws of the State of California, a requirement in order to avoid Section 3440 of the Civil Code.

4. The Referee erred in respect to said order as the fourth finding of fact therein (at p. 7) specifies that:

“[T]he parties to said purchase and sale intended to and did effect a transfer of title to said whiskey at the time said warehouse receipts were delivered to Barnhill Distilleries Company; the original purchase price was subsequently reduced to the sum of \$130,951.44 by means of a credit memorandum issued by Franciscan Farm and Livestock Corp. to Barnhill Distilleries Company, as the result of the compromise of a dispute over the transaction which later arose between the parties * * *”

The above quoted portions of said finding are clearly erroneous and not supported by any evidence appearing in the record. The uncontradicted evidence shows that the parties to the said purchase and sale intended to transfer title only upon an unconditional payment of the complete purchase price agreed upon but said price was never paid. Said finding is also clearly erroneous as the uncontradicted evidence shows that the credit memorandum referred to therein was issued as the result of a dispute arising between one Richard I. Stone, President of Franciscan Farm and Livestock Corp., and Barnhill Distilleries Company, a subsidiary of Glaser Bros., a California corporation, by reason of Stone's alleged violation of a contract between himself as an individual and said Glaser Bros., and had nothing whatsoever to do with the dispute between the parties to the transaction of sale referred to in said finding.

5. The Referee erred in said order as the fifth finding of fact therein (at p. 9) specifies that the

reclamation petitioner was the holder of "valid" warehouse receipts at the time of pledge of the property purportedly covered by said receipts to The Anglo California National Bank of San Francisco. Said finding is wholly erroneous as the uncontradicted evidence shows that the reclamation petitioner held no valid warehouse receipts since the issuer (Hedgeside) of said documents though entitled "warehouse receipts" was not a "warehouseman" as defined by the applicable laws of the State of California.

6. The Referee erred in said order as the fifth finding of fact therein (at p. 10) specifies that:

"* * * Anglo Bank in accepting said warehouse receipt relied solely on the mere possession of said property by Hedgeside as the proprietor of a government bonded warehouse; in accepting said warehouse receipt Anglo Bank was not misled by any act or omission on the part of Petitioner or of anyone acting on behalf of Petitioner."

Said finding of fact is clearly erroneous and not supported by evidence appearing in the record as the uncontradicted evidence shows that the said Anglo Bank did not rely solely on the mere possession of said property by Hedgeside but also relied on its knowledge that Hedgeside was in the business of distilling, producing and selling whiskey and distilled spirits and that in said connection it was customary to have the said products on its premises. Said finding is also erroneous as the uncontradicted evidence shows that the said Anglo Bank was mis-

led by the failure on the part of the reclamation petitioner to remove goods which it had purchased from the bankrupt from the premises of the bankrupt.

7. The Referee erred in said order as the fifth finding of fact therein (at bottom of p. 10) specifies that the reclamation petitioner and the reclamation petitioner's predecessors in interest were the holders of "valid" warehouse receipts covering some 2,859 barrels of whiskey. Said finding is wholly erroneous in that the bankrupt, the issuer of the receipts referred to, had no power to issue valid warehouse receipts since it was not a "warehouseman" as defined by the applicable laws of the State of California.

8. The Referee erred in said order as the fifth finding of fact therein (at p. 9) specifies that:

"[S]aid warehouse receipts of Petitioner for said 574 barrels were delivered to Petitioner through Anglo Bank, the bank acting as collection agent for Hedgeside and delivering said warehouse receipts to Petitioner in exchange for payment of Hedgeside drafts, and Anglo Bank had actual knowledge of said delivery to Petitioner of said warehouse receipts covering said 574 barrels to Petitioner."

Said finding is clearly erroneous as a bank, in functioning as a lending agent, is not charged with notice of matter coming to the attention of an employee in the collection department where there was no obligation or duty on said employee to transmit such notice to a proper officer or managing agent of the bank.

9. The Referee erred in said order as the fifth finding of fact therein (at p. 11) specifies that:

“[T]he warehouse receipts listed above held by Anglo Bank were issued and pledged by Hedgeside to Anglo Bank without the knowledge, authority or consent of Franciscan Farm and Livestock Corp., the original producer and owner of said whiskey, and without the knowledge, authority or consent of said subsequent purchasers of said whiskey and holders of valid warehouse receipts therefor, Barnhill Distilleries Company, Heaven Hill Corporation, and Petitioner, and Anglo Bank in accepting its said warehouse receipts from Hedgeside relied solely on the mere possession of said whiskey by Hedgeside as proprietor of a government bonded warehouse; in accepting its said warehouse receipts Anglo Bank was not misled or deceived by and did not suffer detriment because of any act or omission on the part of Petitioner or of Petitioner’s predecessors in title Barnhill Distilleries Company, Heaven Hill Corporation, and Franciscan Farm and Livestock Corp.”

Said finding is clearly erroneous as the uncontradicted evidence shows that the warehouse receipts referred to, held by the Anglo Bank, were issued with the knowledge and consent of Franciscan Farm and Livestock Corp., such knowledge and consent being acquired and given through its President, Richard I. Stone. Said finding is also clearly erroneous as the uncontradicted evidence shows that the Anglo Bank, in accepting its warehouse receipts,

relied on the known business of Hedgeside as a producer and seller of distilled spirits and whiskey and not on its mere naked possession of such spirits and whiskey. Said finding is also clearly erroneous as the uncontradicted evidence shows that the Anglo Bank was misled and deceived and suffered detriment because of the failure on the part of the reclamation petitioner and its predecessors in title to remove from the premises of the bankrupt the whiskey and spirits assertedly purchased. Finally, said quoted finding is erroneous as the uncontradicted evidence shows that Barnhill Distilleries Company, by reason of its prior consent to a course of conduct on the part of said Richard I. Stone, consented to Stone issuing warehouse receipts covering the property in question produced by Franciscan Farm and Livestock Corp. in the name of the bankrupt and consented to his representing that the bankrupt (Hedgeside) was the owner thereof.

10. The Referee erred in said order as the sixth finding of fact therein (at p. 12) specifies that the bankrupt charged a "reasonable rate" for storage of liquor and spirits on its premises. Said finding is clearly erroneous as the uncontradicted evidence shows that the bankrupt did not charge a reasonable rate but merely an arbitrary and nominal rate.

11. The Referee erred in said order as the seventh finding of fact therein (at p. 12) specifies that copies of warehouse receipts therein referred to were kept at the warehouse where the goods in question were stored. Said finding of fact is clearly erroneous as the uncontradicted evidence shows that copies of said warehouse receipts were not kept at said ware-

house but were kept in a separate building near said warehouse.

12. The Referee erred in said order as the eighth finding of fact therein (at p. 12) specifies that the Anglo Bank was not a creditor of Franciscan Farm and Livestock Corp. This finding is clearly erroneous and not supported by any evidence as the uncontradicted evidence shows and requires a finding that the Anglo Bank was a creditor of the corporation referred to as defined by the applicable California law due to the existence of four causes of action against Franciscan which arose during the year 1948.

13. The Referee erred in said order as the second conclusion of law therein specifies that the reclamation petitioner was the holder of "valid warehouse receipts." Said conclusion of law is wholly erroneous as the issuer of the documents referred to was not a "warehouseman" as defined by the applicable laws of the State of California and consequently had no power or authority to issue "valid warehouse receipts."

14. The Referee erred in said order as the third conclusion of law therein specifies that a pledge by the bankrupt to the Anglo Bank carried no title to or interest in the whiskey referred to. Said conclusion of law is erroneous as the course of conduct and prior consent of the Franciscan Farm and Livestock Corp., its officers, directors and stockholders, to the actions of Richard I. Stone, the President of the bankrupt and the President of said Franciscan Farm and Livestock Corp., clothed Stone with the power to make a pledge of whiskey and spirits pro-

duced by said Franciscan Farm and Livestock Corp. and Stone exercised this power by pledging to the Anglo Bank said whiskey, thereby giving Anglo Bank an interest therein good as against said Franciscan Farm and Livestock Corp. and Barnhill, the wholly owned subsidiary of Glaser Bros., a fifty per cent shareholder of Franciscan.

15. The Referee erred in said order as the fourth conclusion of law therein specifies that a transfer of whiskey and spirits produced by Franciscan Farm and Livestock Corp. to a warehouse operated by the bankrupt constitutes a valid delivery and change of possession within the meaning of Section 3440 of the Code of Civil Procedure of the State of California (question Civil Code). Said conclusion of law is erroneous as Franciscan, the transferor, and Hedgeside, the bankrupt, were under the complete domination and control of the same man, Richard I. Stone, and to move whiskey and spirits from the warehouse of one to the warehouse of the other brought about no change of possession as required by Section 3440 of the Civil Code.

16. The Referee erred in said order as the fifth conclusion of law therein specifies that the bankrupt was a "warehouseman" as defined by the California statutes and was authorized to issue valid warehouse receipts. The conclusions of law referred to are erroneous as the uncontradicted evidence shows that the bankrupt was neither in the business of storing goods nor was it storing goods for profit. Consequently it was not a "warehouseman" as defined by the California statutes and accordingly had no

power to issue, and could not issue, valid warehouse receipts.

17. The Referee erred in said order as the sixth conclusion of law specifies that the California Uniform Warehouse Receipts Act was the exclusive statute controlling the transfer of title and ownership of the whiskey and spirits in question, for all purposes, during the times when the bankrupt was a bailee of such goods. He also erred since he specified that Section 3440 of the Code of Civil Procedure of the State of California has no application. Said conclusion of law is erroneous as Section 3440 of the California Civil Code (the governing code provision) not only applies but is the exclusive statute applying to the validity of the transfers of title as against creditors, since the goods sold remained in the vendor's possession, as the uncontradicted evidence shows that the provisions of Section 3440.5 of the California Civil Code (the exception) were not complied with.

18. The Referee erred in said order as the seventh conclusion of law therein specifies that transfers of the type referred to in said conclusion satisfied the provisions of Section 3440 of the Civil Code treating with the requirements of immediate delivery and actual and continued change of possession. Said conclusion of law is erroneous as the uncontradicted evidence shows, and indeed the findings of fact recite, that all goods which are the subject matter of the reclamation petition filed by Schenley Industries, Inc. have never left the bankrupt's possession and now are in the bankrupt's possession. There has consequently been no change of possession sufficient

to satisfy the provisions of Section 3440 of the California Civil Code.

19. The Referee erred in said order as the ninth conclusion of law specifies that the reclamation petitioner, Schenley Industries, Inc., is the exclusive owner of the 8,933 barrels of whiskey and spirits therein referred to and is entitled to the immediate possession thereof. Said conclusion of law is erroneous as the uncontradicted evidence presented shows that the Trustee in bankruptcy, as a representative of creditors of the bankrupt, is entitled to the possession of all whiskey and spirits referred to as against the reclamation petitioner, because of the failure of the reclamation petitioner to take immediate and continued possession of said whiskey and spirits as required by the provisions of Section 3440 of the California Civil Code.

20. The Referee erred in finding in said order in paragraphs 4a, 4b, and 4c that a true and correct summary of the evidence of the respective purchases referred to appeared respectively in Exhibits B, C and D attached to said order.

21. The Referee erred in finding in said order that reclamation petitioner at any time held all the indicia of ownership for any whiskey or spirits for reasons above given.

22. The Referee erred in finding in said order that duplicate warehouse receipts were at any time issued to Anglo Bank.

23. The Referee erred in not finding in said order that undersigned petitioners were entitled to retain exclusive possession of said 8,933 barrels of whiskey and spirits as against reclamation petitioner.

Wherefore, your petitioners pray that said order be reviewed by a judge of the United States District Court having jurisdiction of the above-entitled bankruptcy proceedings in accordance with the provisions of the National Bankruptcy Act, that said order be reversed, that the reclamation petition brought by Schenley Industries, Inc. be dismissed, and that your petitioners have such other and further relief as is just.

Dated: February 19, 1952.

/s/ CHARLES W. EBNOTHER,
Trustee in Bankruptcy, Petitioner.

/s/ FRANCIS P. WALSH,
Attorney for Petitioner, the Trustee
in Bankruptcy.

THE ANGLO CALIFORNIA NA-
TIONAL BANK OF SAN FRAN-
CISCO,

/s/ By J. H. HOGAN,
Vice President, Petitioner.

/s/ FREDERICK M. FISK,

/s/ CHICKERING & GREGORY,
Attorneys for Petitioner, The Anglo California Na-
tional Bank of San Francisco.

Acknowledgment of Service attached.

[Exhibit A—Order on Reclamation Petition
is set out at pages 15-42 of this printed record.]

[Endorsed]: Filed Feb. 19, 1952.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON PETITION
TO REVIEW RELATIVE TO SCHENLEY
INDUSTRIES, INC., PETITION FOR REC-
LAMATION

The undersigned, one of the Referees in Bankruptcy, in accordance with the provisions of Section 39(a)(8) of the Bankruptcy Act, hereby certifies as follows:

I. — Preliminary Proceedings

On May 17, 1949 an involuntary Petition in Bankruptcy was filed against Hedgeside Distillery Corporation. Thereafter, on June 2, 1949, the said Corporation was adjudicated a bankrupt and the matter was referred to the undersigned, as Referee in Bankruptcy, to take such further proceedings as may be required by said Bankruptcy Act. That on July 26, 1949 Charles W. Ebnother was duly elected Trustee of said bankrupt estate and ever since has been and still is the duly qualified and acting Trustee.

That on the 3rd day of October, 1949, Schenley Industries, Inc., filed a Reclamation Petition praying that an order be made directing Charles W. Ebnother, Trustee, to surrender to said petitioner in reclamation 8,933 barrels of whiskey and grain spirits. In said petition Schenley Industries, Inc. stated that Anglo California National Bank of San Francisco claims an interest in said property adverse to said petitioner.

(The original Reclamation Petition filed October

3, 1949, is forwarded herewith and made a part of this Certificate.)

That on the 18th day of October, 1949, Charles W. Ebnother, Trustee filed his answer to the Reclamation Petition filed by Schenley Industries, Inc.

(The original answer of Charles W. Ebnother as Trustee of Hedgeside Distillery Corporation, a corporation, bankrupt, to Reclamation Petition filed by Schenley Industries, Inc., is forwarded herewith and made a part of this Certificate.)

That on the 18th day of October, 1949, Anglo California National Bank of San Francisco filed its answer to Reclamation Petition filed by Schenley Industries, Inc.

(The original answer of Anglo California National Bank of San Francisco to Reclamation Petition is forwarded herewith and made a part of this Certificate.)

II. — Statement of Questions Presented

The order being reviewed states that Schenley Industries Inc. is the owner and entitled to the immediate possession of 8,933 barrels of whiskey and grain spirits that were in the possession of the above-named bankrupt as of the date of bankruptcy. Schenley Industries, Inc. holds documents purporting on their face to be warehouse receipts covering all of the property sought to be reclaimed. The Trustee in Bankruptcy contends that the transfer of said property to Schenley Industries, Inc. is invalid as to creditors of said bankrupt since the reclamation petitioner failed to take possession of said property as required by Section 3440 of the Civil

Code of the State of California. The Trustee in Bankruptcy also contends that the documents designated "warehouse receipts" are insufficient in law to avoid the effect of said Section 3440 claiming that the issuer of said receipts was not a "warehouseman" as defined by the Uniform Warehouse Receipts Act and the applicable California statutes and, therefore, not within the exception of Section 3440.5 of said Civil Code. The Anglo California National Bank of San Francisco has set up a claim of title in itself as to a portion of said whiskey and spirits due to a pledge made to it by the bankrupt and based on duplicate warehouse receipts.

III. — Hearing

At the time and place fixed for the hearing of Schenley Industries, Inc.'s Reclamation Petition there appeared before the undersigned Messrs. Bronson, Bronson & McKinnon by and through Kirke La Shelle, Esq. and John F. Ward, Esq. representing the petitioning claimant; Messrs. Chickering & Gregory by and through Frederick M. Fisk, Esq. and Bruce M. Casey, Jr., Esq. and said Trustee in Bankruptcy being represented by Francis P. Walsh, Esq. Said matter was heard and considered by the undersigned Referee in Bankruptcy upon the record and pleadings aforesaid upon oral and documentary evidence upon oral arguments and briefs filed by counsel.

(Reporter's transcripts of proceedings Volumes I to IX inclusive, covering hearings from October 18, 1949, to December 11, 1950, are forwarded herewith.)

That upon the conclusion of the testimony taken on December 11, 1950, the undersigned Referee in Bankruptcy directed counsel for the respective parties to submit written memoranda upon the issues raised by said Reclamation Petition.

(There is forwarded herewith Petitioner's Opening Brief filed February 3, 1951; Brief of Respondents, The Trustee in Bankruptcy and The Anglo California National Bank of San Francisco, in opposition to Reclamation Petition of Schenley Industries, Inc., filed April 24, 1951; Closing Brief for Petitioner Schenley Industries, Inc., on Petition For Reclamation, filed August 11, 1951.)

That on the 10th day of January, 1952, the undersigned Referee in Bankruptcy made and entered in said proceedings Order on Reclamation Petition.

(The original Order on Reclamation Petition is forwarded herewith as a part of this Certificate.)

IV. — Findings

The undersigned Referee in Bankruptcy found:

1. Petitioner herein is now and at all times herein mentioned was a corporation authorized to do and doing business within the State of California. Prior to January 4, 1949, the corporate name of petitioner was "Schenley Distillers Corporation" and on said date the corporate name of petitioner was changed to "Schenley Industries, Inc."

2. The bankrupt, Hedgeside Distillery Corporation, hereinafter referred to as "Hedgeside", was duly adjudicated as a bankrupt on or about June 2, 1949, an involuntary Petition in Bankruptcy having been filed in the above-entitled Court by three of its

creditors on or about May 17, 1949; on or about June 2, 1949, said bankruptcy proceedings were duly referred to the Honorable Bernard J. Abrott, Referee in Bankruptcy; on or about July 26, 1949; Charles W. Ebnother, Esq. was duly appointed Trustee of the property of said bankrupt, and thereafter qualified and is now, and at all times during the pendency of the Reclamation Petition has been, the duly appointed, qualified and acting Trustee in Bankruptcy of said bankrupt; the Anglo Bank is, and was at all times mentioned herein, a national banking association with its principal office at San Francisco, California.

3. At the time of the filing of said involuntary Petition in Bankruptcy, to-wit; on or about May 17, 1949, the bankrupt had in its possession and the Trustee has at all times since July 26, 1949, and now has in his possession the following described property:

8,933 barrels of whiskey and grain spirits stored in bond by the bankrupt for petitioner in Internal Revenue Bonded Warehouse No. 2, Hedgeside Distillery Corporation, Napa, California, the serial numbers of said barrels and warehouse receipt data being set out in Exhibit A hereto, incorporated by this reference herein and made a part hereof for all purposes; Petitioner has made demand on the Trustee for the surrender of said 8,933 barrels of whiskey and grain spirits, and said Trustee has failed and refused to surrender the same to petitioner.

4. Said 8,933 barrels of whiskey and grain spirits

were purchased for value by petitioner from the respective owners thereof as set forth below; said owners intended to transfer the ownership and legal title thereto to petitioner on the respective dates of the transactions set forth below in exchange for the purchase price which said owners received, and at the time of the filing of said Petition in Bankruptcy said 8,933 barrels stored in bond in Internal Revenue Bonded Warehouse No. 2 were covered by warehouse receipts issued to petitioner by Hedgeside and now held by petitioner, the serial numbers and dates of issue of said warehouse receipts being set out in Exhibit A hereto, incorporated by this reference herein and made a part hereof for all purposes; said purchases and sales are made in the following manner:

(a) Petitioner purchased a total of 4,815 barrels of said spirits from Hedgeside, the bankrupt;

Beginning in March, 1947, petitioner purchased 1,293 barrels of said spirits from Hedgeside pursuant to a production contract for grain spirits dated September 17, 1945 (Petitioner's Exhibit Nos. 14 and 15) as amended (Petitioner's Exhibits Nos. 16, 17, 18, 19, 20 and 21) the documentary evidence of said purchase and sale, including warehouse receipts covering said spirits, being contained in petitioner's Exhibit No. 52; beginning in October, 1947, petitioner purchased 3,191 barrels of said spirits from Hedgeside pursuant to a production contract for grain spirits dated October 13, 1947, (Petitioner's Exhibit Nos. 22-A and 22-B) the documentary evidence of said purchase and sale being

contained in Petitioner's Exhibit Nos. 53 and 65; all of said 1,293 and 3,191 barrels of spirits purchased under said production contracts were inspected and accepted by a representative of petitioner at Hedgeside as produced, said spirits were placed in barrels furnished by petitioner for that purpose, said barrels of spirits were then immediately stored in bond in Hedgeside's Internal Revenue Bonded Warehouse No. 2, Napa, California, and warehouse receipts covering said spirits were issued by Hedgeside to petitioner which warehouse receipts are still held by petitioner, excepting that the spirits covered by warehouse receipt numbers 3665-B, 3669-B, and 3670-B were originally stored in bond in Internal Revenue Bonded Warehouse No. 111 of Franciscan Farm and Livestock Corp., a corporation, located at Yountville, California, and thereafter transferred in bond to Hedgeside Internal Revenue Bonded Warehouse No. 2, as set out in Petitioner's Exhibit No. 45;

Also pursuant to said contract of October 13, 1947 (Petitioner's Exhibit Nos. 22-A and 22-B) in November, 1947, petitioner purchased from Hedgeside 331 barrels of "on Hand" spirits (part of which was in fact whiskey but which has been treated by the parties throughout as grain spirits) the documentary evidence of said purchase and sale being contained in Petitioner's Exhibit Nos. 50 and 65; of the warehouse receipts now held by petitioner covering said 331 barrels, warehouse receipts Nos. 3511-B and 3512-B were issued by Hedgeside to petitioner at the time of said sale and the spirits

covered thereby were then stored in bond in Hedgeside Internal Revenue Bonded Warehouse No. 2, whereas the spirits now covered by warehouse receipts Nos. 3671-B and 3673-B were at the time of said sale stored in bond in Internal Revenue Bonded Warehouse No. 111 of Franciscan Farm and Livestock Corp., and thereafter transferred in bond to Hedgeside Internal Revenue Bonded Warehouse No. 2, as set out in Petitioner's Exhibit No. 45; a true and correct summary of the evidence of said purchases of the above 4,815 barrels of said spirits by petitioner from Hedgeside is set out in Exhibit "B" hereto which is incorporated herein and made a part hereof for all purposes.

(b) Petitioner purchased a total of 1,359 barrels of said grain spirits from Franciscan Farm and Livestock Corp., a California corporation;

In March and April, 1947, pursuant to a production contract for grain spirits between one R. I. Stone, d.b.a. Franciscan Farm and Livestock Corp., and petitioner, dated November 1, 1945, assigned by Stone to Franciscan Farm and Livestock Corp., a California corporation (Petitioner's Exhibits Nos. 23 and 25-B) petitioner purchased 459 barrels of said spirits from Franciscan Farm and Livestock Corp., the documentary evidence of said purchase and sale being contained in Petitioner's Exhibit No. 49; concurrently with the production and sale of said 459 barrels of spirits said spirits were inspected and accepted by a representative of petitioner at Franciscan as produced, said spirits were placed in barrels furnished by petitioner for that purpose, and

said barrels of spirits were then stored in bond in Internal Revenue Bonded Warehouse No. 2 of Hedgeside and warehouse receipts issued by Hedgeside to petitioner covering said barrels which warehouse receipts are still held by petitioner;

Between December, 1947 and April, 1948, pursuant to a production contract for grain spirits between Franciscan Farm and Livestock Corp. and petitioner dated October 13, 1947 (Petitioner's Exhibit Nos. 25-A and 25-B) petitioner purchased 900 barrels of said spirits from Franciscan Farm and Livestock Corp., the documentary evidence of said purchase and sale being contained in Petitioner's Exhibit Nos. 51, 64 and 50; concurrently with the purchase and sale of said 900 barrels of spirits, said spirits were inspected and accepted by a representative of petitioner at Franciscan as produced, said spirits were placed in barrels furnished by petitioner for that purpose, and said barrels of spirits were then stored in bond in Internal Revenue Bonded Warehouse No. 111 of Franciscan and covered by warehouse receipts issued by Franciscan to petitioner, and in November and December, 1948, said barrels were transferred in bond to Internal Revenue Bonded Warehouse No. 2 of Hedgeside, as set out in Petitioner's Exhibit Nos. 45 and 51, at which time the warehouse receipts for said barrels now held by petitioner were issued to petitioner by Hedgeside; a true and correct summary of the evidence of said purchases of the above 1,359 barrels of said spirits from Franciscan is set out in Exhibit "C" hereto which is incorporated herein and made a part hereof for all purposes;

(c) The balance of said 8,933 barrels of whiskey and grain spirits, totalling 2,759 barrels of whiskey, was purchased by petitioner from Heaven Hill Corporation, a California corporation, by an oral contract made between the parties in December, 1947, and performed by the parties in January, 1948, and petitioner is now the holder of warehouse receipts Nos. 3681B, 3682B, 3683B, and 3684B issued by Hedgeside to petitioner covering said whiskey now stored in bond in Internal Revenue Bonded Warehouse No. 2 of Hedgeside; said 2,759 barrels of whiskey was originally produced by Franciscan Farm and Livestock Corp. at its distillery at Yountville, California, and continuously stored in bond since production in Internal Revenue Bonded Warehouse No. 2 of Hedgeside, subject to warehouse receipts issued from time to time to the respective owners by Hedgeside as follows:

Concurrently with its production between October, 1946, and January, 1947, 2,861 barrels of whiskey (of which said 2,759 barrels of whiskey is a part) was sold by Franciscan Farm and Livestock Corp. to Barnhill Distilleries Company, a California corporation, and a wholly-owned subsidiary of Glaser Bros., a California corporation, pursuant to an oral agreement between the parties; said whiskey was stored in bond in Internal Revenue Bonded Warehouse No. 2 of Hedgeside as produced, and its sale to Barnhill Distilleries Company completed within a few days of production by delivery of Hedgeside warehouse receipts to Barnhill Distilleries Company in exchange for the agreed purchase

price of \$162,316.50 which was paid to Franciscan by Glaser Bros., the documentary evidence of said purchase and sale being contained in petitioner's Exhibit No. 7 (invoices, checks and drafts) Petitioner's Exhibit Nos. 2, 3, 4 and 5 (Cancelled warehouse receipts originally issued to Barnhill contained in Hedgeside Warehouse Receipt Book) and Anglo Bank's Exhibit No. 34 (Franciscan Journal) the parties to said purchase and sale intended to and did effect a transfer of title to said whiskey at the time said warehouse receipts were delivered to Barnhill Distilleries Company; the original purchase price was subsequently reduced to the sum of \$130,951.44 by means of a credit memorandum issued by Franciscan Farm and Livestock Corp. to Barnhill Distilleries Company, as the result of the compromise of a dispute over the transaction which later arose between the parties;

Barnhill Distilleries Company held all of said warehouse receipts covering said 2,861 barrels of whiskey from January, 1947, the date of issue of the last of said receipts, until January 3, 1948, except for two barrels which were disposed of by Barnhill during the period; on January 3, 1948, Barnhill exchanged said receipts covering 2,759 barrels of said whiskey for four negotiable warehouse receipts of Hedgeside, Warehouse Receipt Nos. 384, 385, 386 and and 387 (Petitioner's Exhibit No. 1) and in accordance with an oral agreement of sale with Heaven Hill Corporation delivered said four negotiable warehouse receipts covering said 2,859 barrels of said whiskey to Heaven Hill Corporation

in exchange for the purchase price of \$131,983.70 (Petitioner's Exhibit Nos. 8 and 9);

Pursuant to said oral agreement of sale between Heaven Hill Corporation and Petitioner, Heaven Hill Corporation immediately delivered said four negotiable warehouse receipts covering said 2,859 barrels of whiskey to Petitioner in exchange for the purchase price for said whiskey to Petitioner of \$150,314.77. (Petitioner's Exhibit Nos. 11A, 11B and 11C);

Petitioner held said four negotiable warehouse receipts covering said 2,859 barrels of whiskey from January to December, 1948, except that during this period 100 barrels of said whiskey covered by warehouse receipt No. 384 were withdrawn by Petitioner; on December 22, 1948, Petitioner exchanged said four negotiable warehouse receipts, covering 2,759 barrels of said whiskey, for non-negotiable warehouse receipts of Hedgeside, Nos. 3681B, 3682B, 3683B, 3684B (Petitioner's Exhibit No. 26) which warehouse receipts are now and ever since said date have been held by Petitioner;

A true and correct summary of the evidence of said transactions covering said 2,759 barrels of whiskey is set out in Exhibit "D" hereto which is incorporated herein and made a part hereof for all purposes;

5. Anglo Bank is the holder of duplicate warehouse receipts covering 3,333 barrels of said 8,933 barrels of whiskey and spirits, said duplicate receipts having been pledged by Hedgeside to secure loans made by Anglo Bank to Hedgeside, as follows:

(a) On January 4, 1949, Hedgeside pledged to Anglo Bank as security for a loan its warehouse receipt No. 3689B purporting to cover 574 barrels of the 3,191 barrels of grain spirits described in paragraph 4-A of the above findings of fact, which spirits had been purchased by Petitioner from Hedgeside between October, 1947, and March, 1948; at the time of said pledge to Anglo Bank, Petitioner was the holder of valid Hedgeside warehouse receipts for the same 574 barrels of grain spirits, as follows:

No. of Barrels and Serial Numbers	No. and Date of Issue of Petitioner's Warehouse Receipts	No. and Date of Issue of Anglo Bank's Warehouse Receipts
69 70228-296	3525B (11-24-47))
27 70942-968	3538B (Undated))
50 70969-71018	3539B (12-8-47))
74 71069-71142	3541B (12-10-47))
96 71143-71238	3543B (12-11-47))
85 71239-71323	3544B (12-12-47))
150 71324-71473	3545B (12-15-47))
23 71474-71496	3545B (12-15-47))

574 Barrels

All of the above warehouse receipts now held by Petitioner for said 574 barrels of spirits were issued by Hedgeside and delivered by it to Petitioner pursuant to said production contract described in 4 (a) hereof more than one year prior to the issue and pledge by Hedgeside of Receipt No. 3689-B to Anglo Bank (Receipt No. 3538B, undated, was delivered to Petitioner on or about December 9, 1947) said warehouse receipts of Petitioner for said 574 barrels were delivered to Petitioner through Anglo

Bank, the bank acting as collection agent for Hedgeside and delivering said warehouse receipts to Petitioner in exchange for payment of Hedgeside drafts, and Anglo Bank had actual knowledge of said delivery to Petitioner of said warehouse receipts covering said 574 barrels to Petitioner;

Petitioner at all times since delivery to it of said warehouse receipts retained and held all the indicia of ownership of said 574 barrels and Hedgeside was at no time clothed with the apparent ownership of said property but held only the naked possession thereof in its capacity as a bonded warehouseman; said warehouse receipt No. 3689-B was issued and pledged by Hedgeside to Anglo Bank without Petitioner's knowledge, authority, or consent, and Anglo Bank in accepting said warehouse receipt relied solely on the mere possession of said property by Hedgeside as the proprietor of a government bonded warehouse; in accepting said warehouse receipt Anglo Bank was not misled by any act or omission on the part of Petitioner or of anyone acting on behalf of Petitioner;

(b) Between June 17, 1947 and September 16, 1948, Hedgeside pledged to Anglo Bank as security for loans to Hedgeside its warehouse receipts purporting to cover said 2,859 barrels of whiskey, described in paragraph 4 (c) hereof, which whiskey had been produced by Franciscan Farm and Livestock Corp. and sold by it to Barnhill Distilleries Company as produced; the numbers and dates of issues of said warehouse receipts pledged by Hedgeside to Anglo Bank are as follows:

No.	Date of Issue	No. of Barrels
3469-B	6-17-47	225
3470-B	6-17-47	735
3472-B	7-30-47	100
3474-B	9-10-47	100
3475-B	9-16-47	200
3476-B	9-16-47	200
3477-B	10-22-47	200
3548-B	12-17-47	200
3552-B	9-16-48	899

2,859

As set out in said paragraph 4 (c) hereof and as summarized by Exhibit "D" hereto, at the time of said purported pledges to Anglo Bank, Petitioner or Petitioner's predecessors in title were the holders of valid warehouse receipts covering said 2,859 barrels of whiskey, then stored in Hedgeside's Internal Revenue Bonded Warehouse No. 2, the last warehouse receipt for said whiskey having been issued to Barnhill Distilleries Company more than four months before the first warehouse receipt for said whiskey was pledged to Anglo Bank;

Petitioner, or Petitioner's predecessors in title, Heaven Hill Corporation and Barnhill Distilleries Company, at all times since delivery to them of their warehouse receipts covering said whiskey, retained and held all the indicia of ownership of said whiskey and Hedgeside was at no time clothed with the apparent ownership of said property but held only the naked possession thereof in its capacity as a bonded warehouseman; the warehouse receipts listed above held by Anglo Bank were issued and pledged by Hedgeside to Anglo Bank without the knowledge, authority or consent of Franciscan Farm and Live-

stock Corp., the original producer and owner of said whiskey, and without the knowledge, authority or consent of said subsequent purchasers of said whiskey and holders of valid warehouse receipts therefor, Barnhill Distillers Company, Heaven Hill Corporation, and Petitioner, and Anglo Bank in accepting its said warehouse receipts from Hedgeside relied solely on the mere possession of said whiskey by Hedgeside as proprietor of a government bonded warehouse; in accepting its said warehouse receipts Anglo Bank was not misled or deceived by and did not suffer detriment because of any act or omission on the part of Petitioner or of Petitioner's predecessors in title Barnhill Distilleries Company, Heaven Hill Corporation, and Franciscan Farm and Livestock Corp.

6. At all times herein mentioned up to the date of filing of said involuntary Petition in Bankruptcy, Hedgeside's Internal Revenue Bonded Warehouse No. 2 held a permit to operate said warehouse duly issued by the United States, Alcohol Tax Unit Form 27-D (Petitioner's Exhibit Nos. 46 and 47) and at all of said times held a "Distilled Spirits Manufacturer's License" and a "Public Warehouse" license duly issued by the Board of Equalization of the State of California; at all of said times Hedgeside did not advertise for or solicit customers for the storing of spirits and whiskey and did not regularly store goods for the public generally, but in the regular course of its business Hedgeside stored in bond whiskey and spirits produced in its own distillery and whiskey and spirits owned by a

limited number of persons licensed to deal in bulk whiskey and spirits and with whom Hedgeside did business, charging a reasonable rate in the regular course of business for such storage.

7. The principal place of business of Hedgeside and its Internal Revenue Bonded Warehouse No. 2 at all times herein mentioned was located at Napa, California, and at all of said times copies of warehouse receipts issued by Hedgeside covering whiskey and spirits stored in bond in its Internal Revenue Bonded Warehouse No. 2 were kept at said principal place of business and at said warehouse.

8. At all times herein mentioned during the year 1948 Anglo Bank was not a creditor of Franciscan Farm and Livestock Corp., a corporation.

V. — Conclusions of Law

The Court concluded, as matters of law, that:

1. At all times hereinabove mentioned and in each of said transactions wherein Petitioner purchased said whiskey and spirits, Petitioner was and is a bona fide purchaser of said whiskey and spirits totalling 8,933 barrels.

2. At the time of said pledge by Hedgeside to Anglo Bank of duplicate warehouse receipts for said 574 barrels of spirits hereinabove described, Hedgeside was not the owner of said spirits nor did it have any right, title or interest in or to said spirits except as bailee for Petitioner, who was at said time the owner of said spirits and the holder of valid warehouse receipts for the same; Anglo Bank has no right, title or interest whatsoever in or to said

574 barrels of spirits by virtue of said pledge or said duplicate warehouse receipts, or otherwise.

3. Hedgeside was at no time the owner of said 2,759 barrels of whiskey hereinabove described, nor did Hedgeside have any right, title or interest to said whiskey except as bailee for the true owners thereof, and said pledge by Hedgeside to Anglo Bank of duplicate warehouse receipts for said whiskey carried no title to or interest in said whiskey to Anglo Bank; prior to said pledge of said duplicate warehouse receipts said whiskey consisting of said 2,859 barrels had been sold by Franciscan Farm and Livestock Corp., the producer and original owner of said whiskey, to Barnhill Distilleries Company, which thereby became the owner of said whiskey and which passed good title thereto to Heaven Hill Corporation, Petitioner's predecessor in title; Anglo Bank has no right, title or interest whatsoever in or to said whiskey, or any part thereof, by virtue of said pledge or duplicate warehouse receipts, or otherwise, and Anglo Bank has no right, title or interest in or to the balance of said 8,933 barrels of whiskey and spirits, or any part thereof.

4. At all times hereinabove mentioned when whiskey and spirits produced by Franciscan Farm and Livestock Corp. were transferred into storage in Hedgeside's said warehouse concurrently with the sale of said whiskey and spirits, there was an immediate delivery and an actual and continued change of possession of said goods within the meaning of Section 3440 of the Code of Civil Procedure of the Code of Civil Procedure of the State of California.

5. At all times hereinabove mentioned prior to the filing of said involuntary Petition in Bankruptcy, Hedgeside was a warehouseman as defined in the California Uniform Warehouse Receipts Act, and at all of said times was lawfully engaged in the business of storing goods for profit, and was authorized to and did issue valid warehouse receipts for goods so stored, including said warehouse receipts now held by Petitioner for said 8,933 barrels of whiskey and spirits; at all said times Hedgeside was not a public utility under the Public Utilities Act of California.

6. At all times hereinabove mentioned when Hedgeside issued its warehouse receipts as bailee for said 8,933 barrels of whiskey and spirits stored in its Internal Revenue Bonded Warehouse No. 2, the California Uniform Warehouse Receipts Act was the exclusive statute governing and controlling the transfer of title to said whiskey and spirits and the ownership thereof, for all purposes, and the provisions of Section 3440 of the Code of Civil Procedure of the State of California had and has no application whatsoever to said whiskey and spirits so stored under said warehouse receipts.

7. At all times hereinabove mentioned Hedgeside was the lawful proprietor of a United States Government bonded warehouse pursuant to and authorized by the laws and regulations of the United States, namely, Internal Revenue Bonded Warehouse No. 2; at all times hereinabove mentioned when portions of said 8,933 barrels of whiskey and spirits were stored in the bonded warehouse of

Franciscan Farm and Livestock Corp. said corporation was the lawful proprietor of a United States Government bonded warehouse pursuant to and authorized by the laws of the United States, namely, Internal Revenue Bonded Warehouse No. 111; at all of said times the transfer of all or part of said 8,933 barrels of whiskey into bond in said warehouses subjected said whiskey and spirits to the statutes contained in the Internal Revenue Code of the United States, and to the regulations promulgated thereunder, and said transfers into bond concurrently with the sale of said whiskey and spirits were accompanied by an immediate delivery and an actual and continued change of possession within the meaning of Section 3440 of the Code of Civil Procedure of the State of California.

8. At all times hereinabove mentioned when Hedgeside issued its warehouse receipts to petitioner for all or part of said 8,933 barrels of whiskey and spirits, Hedgeside recognized the conveyance to Petitioner of said goods and confirmed said conveyance by the making of the storage contract contained in said warehouse receipts, and Hedgeside as bailee for Petitioner was and is estopped from disputing Petitioner's title to said goods as against Hedgeside.

9. Said bankrupt, Hedgeside and its estate, and said Trustee in Bankruptcy, have no right, title or interest whatsoever in or to said 8,933 barrels of whiskey and spirits, or any part thereof, either legal or equitable; Petitioner is the exclusive owner of said 8,933 barrels of whiskey and spirits and is entitled to the immediate possession thereof.

Based upon said Findings and Conclusions the undersigned Referee made the following Order:

“It Is Ordered that Petitioner’s said Reclamation Petition be and the same is hereby granted, and the said Trustee is ordered and directed to forthwith surrender and deliver said 8,933 barrels of whiskey and spirits to Petitioner.”

V. — Review

That subsequent to the 10th day of January, 1952, and within the time allowed by law (pursuant to extension of time regularly granted) said Charles W. Ebnother, Trustee in Bankruptcy, and the Anglo California National Bank of San Francisco filed Petition for Review, dated and filed February 19, 1952.

(The original Petition for Review is forwarded herewith as a part of this Certificate.)

Dated: March 5, 1952.

Respectfully submitted,

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

The following documents are forwarded herewith as a part of this Certificate:

1. Reclamation Petition.
2. Answer of Charles W. Ebnother as Trustee of Hedgeside Distillery Corporation, a corporation, Bankrupt, to Reclamation Petition filed by Schenley Industries, Inc.
3. Answer to Reclamation Petition (filed by The Anglo California National Bank of San Francisco).

4. Petitioner's Opening Brief.
5. Brief of Respondents, the Trustee in Bankruptcy and The Anglo California National Bank of San Francisco, in Opposition to Reclamation Petition of Schenley Industries, Inc.
6. Closing Brief for Petitioner Schenley Industries, Inc., on Petition for Reclamation.
7. Order on Reclamation Petition.
8. Petition for Review.
9. Volumes I to IX inclusive, Transcript of Testimony.

[Endorsed]: Filed March 6, 1952.

[Title of District Court and Cause.]

NOTICE

Notice Is Hereby Given that the "Referee's Certificate on Petition to Review Relative to Schenley Industries, Inc., Petition for Reclamation" was forwarded to the Clerk of the above-entitled Court on the 5th day of March, 1952, and in the ordinary course of events should be on the Calendar in the Post Office Building, Sacramento, California, on the 17th day of March, 1952, at 10:00 o'clock a.m. under the provisions of Rules of Practice of District Court of the United States, Northern District, of California (Bankruptcy Rules, Rule 8) effective July 1, 1944. It is suggested that Counsel representing the interested parties should check with the Clerk of the Court (Northern Division, at Sacramento) to make

certain that said matter will come on for hearing on said above-mentioned date.

Dated: March 5, 1952.

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 6, 1952.

[Title of District Court and Cause.]

SUPPLEMENT TO REFEREE'S CERTIFICATE ON PETITION TO REVIEW RELATIVE TO SCHENLEY INDUSTRIES, INC., PETITION FOR RECLAMATION

On Page 3, under the title "Hearing", on the Referee's Certificate forwarded to the United States District Court on March 5, 1952, there appears the following statement:

"Messrs. Chickering & Gregory by and through Frederick M. Fisk, Esq. and Bruce M. Casey, Jr., Esq. and said Trustee in Bankruptcy being represented by Francis P. Walsh, Esq."

The Certificate should read:

"Messrs. Chickering & Gregory by and through Frederick M. Fisk, Esq. and Bruce M. Casey, Jr., Esq., representing the Anglo California National Bank of San Francisco, and said Trustee in Bank-

ruptcy being represented by Francis P. Walsh, Esq.”

Dated: March 6, 1952.

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

[Endorsed]: Filed March 7, 1952.

In the District Court of the United States for
the Northern District of California,
Northern Division

No. 11327

In the Matter of
HEDGESIDE DISTILLERY CORPORATION
a corporation,
Bankrupt.

OPINION AND ORDER

The trustee of a bankrupt distillery whose president is languishing in San Quentin and two bona fide claimants of opposing interests in thousands of barrels of whisky and grain spirits—these are the protagonists in this complicated forensic drama.

At stake is the ownership of merchandise valued at hundreds of thousands of dollars. The hearing before the Referee in Bankruptcy consumed thirty-six days of trial time. The testimony is reported in 2,523 pages of transcript. In addition, thousands of documents were introduced in evidence. Yet, as will

be more fully developed presently, the very parties that are here objecting to the Referee's order have repeatedly insisted that "the material facts are not in dispute" and that "the present petition for review presents only questions of law". The questions of law, however, are many, diverse, and complex.

1. The Dramatis Personae

Because the cast of characters is somewhat large, the Court is adopting the shortened individual and corporate designations used by the parties in this Court and in the hearings before the Referee in Bankruptcy:

Schenley Industries, Inc.: "Schenley".

Hedgeside Distillery Corporation: "Hedgeside".

R. I. Stone: "Stone".

Franciscan Farm and Livestock Corporation:
"Franciscan".

Glaser Bros: "Glaser".

Barnhill Distilleries Company: "Barnhill".

The Anglo California National Bank of San Francisco: "Bank".

Heaven Hill Company: "Heaven Hill".

The word "barrels" includes the contents as well as the receptacles.

2. The Reclamation Petition

On October 3, 1949, Schenley filed a reclamation petition in this Court. The petition sets forth that on or about May 17, 1949, an involuntary petition in bankruptcy was filed in this Court by certain named creditors of Hedgeside, and that the latter was adjudicated a bankrupt on June 2, 1949, on

which date the proceedings were referred to Bernard J. Abrott, Referee in Bankruptcy.

The reclamation petition contains the following further allegations:

On July 26, 1949, Charles W. Ebnoter was appointed Trustee of the bankrupt's property. At the time of the filing of the petition in bankruptcy, the bankrupt had in its possession, and the Trustee now holds, 2,893 barrels of whisky and 6,040 barrels of grain spirits, or a total of 8,933 barrels, stored in bond for Schenley in Hedgeside's Internal Revenue Bonded Warehouse No. 2, hereinafter referred to as "No. 2", at Napa, California.

The barrels of whisky and grain spirits are covered by warehouse receipts issued by Hedgeside, the bankrupt, and now held by Schenley, which is the owner of the whisky and the spirits.

Schenley has been informed and believes and therefore alleges that the Bank claims an adverse interest in the property, and is therefore a proper party to this proceeding.

The petition closes with a prayer that the Trustee be ordered to surrender the 8,933 barrels of whisky and spirits to Schenley.

3. The Trustee's Answer

On October 18, 1949, the Trustee and the Bank filed separate answers to the reclamation petition.

The Trustee admits most of the allegations of the petition, but he denies that the barrels in question belong to Schenley. He admits that the barrels are covered by warehouse receipts issued by Hedgeside

to Schenley, but alleges that the receipts are void as against Hedgeside's unsecured creditors, in that at the time the receipts were issued, the barrels, which are described in an exhibit attached to the reclamation petition were, and are now, Hedgeside's property, "and there was no transfer accompanied by any delivery or change of possession" from Hedgeside to Schenley, as required by Section 3440 of the Civil Code of California, *infra*, hereinafter referred to simply as "Section 3440".

The prayer asks that the legal title to the whisky and spirits be adjudicated in the Trustee, clear of any liens or claims of Schenley or the Bank. Though in an earlier part of his answer the Trustee denies that he has possession of the whisky and the grain spirits, in his prayer he admits it.

4. The Bank's Answer

Like the Trustee, the Bank denies that the barrels and their contents belong to Schenley, and alleges that any issuance by Hedgeside of the warehouse receipts on barrels of whisky mentioned in the aforesaid Schenley exhibit is void, as such receipts are subsequent to receipts issued by Hedgeside to the Bank, to secure repayment of money advances made by the Bank to Hedgeside. It is further stated that the warehouse receipts mentioned in the Schenley exhibit, together with those issued to Schenley's predecessors in title, are void as against Hedgeside's unsecured creditors, in that at the time the receipts were issued the barrels purported to be transferred by them were the property of Hedge-

side and there was no delivery followed by any actual and/or continued change of possession.

The answer admits that the Bank claims an interest in the 8,933 barrels of whisky and spirits. It alleges that on certain specified dates the Bank lent Hedgeside "in good faith" certain sums of money, and received as security a pledge of whisky and spirits covered by warehouse receipts, as per a table incorporated in the answer. The table lists 2,859 barrels of whisky, valued at \$99,703, and 574 barrels of spirits, valued at \$18,130. It is further alleged that no part of these amounts have been repaid.

Unlike the Trustee, the Bank prays simply that Schenley "take nothing by its petition for reclamation."

5. The Referee's Findings and Conclusions

On January 10, 1952, the Referee issued an Order, Findings of Fact, and Conclusions of Law. What follows is a summary of that document.

The 8,933 barrels of whisky and spirits were purchased for value by Schenley from the respective owners thereof as set forth below. The owners intended to transfer the ownership and legal title to Schenley in exchange for the purchase price that they received. At the time of the filing of the petition in bankruptcy the 8,933 barrels, stored in bond in No. 2, were covered by warehouse receipts issued by Hedgeside to Schenley and now held by the latter.

Schenley's purchases were made in the following manner:

(a) Schenley purchased a total of 4,815 barrels of spirits from Hedgeside, as follows:

Beginning in March, 1947, Schenley bought 1,293 barrels pursuant to a production contract for grain spirits, dated September 17, 1945. Beginning in October, 1947, Schenley purchased 3,191 barrels pursuant to a production contract dated October 13, 1947. All of these 1,293 and 3,191 barrels were inspected and accepted by a representative of Schenley at Hedgeside as produced. The spirits were placed into barrels furnished by Schenley, and were then immediately stored in No. 2, except as hereinafter noted. Warehouse receipts covering the merchandise were issued by Hedgeside to Schenley, and are still held by the latter. The spirits covered by warehouse receipts Nos. 3665-B, 3669-B, and 3670-B were originally stored in Internal Revenue Bonded Warehouse No. 111, hereinafter referred to as "No. 111", of Franciscan, at Yountville, California, and were thereafter transferred in bond to No. 2.

Also pursuant to the contract of October 13, 1947, in November, 1947, Schenley purchased from Hedgeside 331 barrels of "on hand" spirits — part of which lot was in fact whisky but which has been treated by the parties throughout as grain spirits. Of the receipts now held by Schenley covering these 331 barrels, receipts Nos. 3511-B and 3512-B were issued by Hedgeside to Schenley at the time of the sale and the spirits covered thereby were then stored in bond in No. 2, whereas the spirits now covered by receipts Nos. 3671-B and 3673-B were

at the time of the sale stored in bond in No. 111, and thereafter transferred in bond to No. 2.

(b) Schenley purchased a total of 1,359 barrels of grain spirits from Franciscan. In March and April, 1947, pursuant to a production contract for grain spirits between Stone, d.b.a. as Franciscan, and Schenley, dated November 1, 1945, assigned by Stone to Franciscan, Schenley purchased 459 barrels of spirits from Franciscan. Concurrently with the production and sale of these barrels, the spirits were inspected and accepted by a representative of Schenley at Franciscan as produced. The spirits were placed into barrels furnished by Schenley and were then stored in bond in No. 2. Warehouse receipts were issued by Hedgeside to Schenley covering those barrels, and are still held by Schenley.

Between December, 1947, and April, 1948, pursuant to a production contract for spirits between Franciscan and Schenley, dated October 13, 1947, Schenley purchased 900 barrels of the spirits from Franciscan. As before, the spirits were inspected, accepted, and barreled, and were then stored in bond in No. 111, being covered by receipts from Franciscan to Schenley. In November and December, 1948, the barrels were transferred in bond to No. 2. At that time the receipts for the barrels were issued to Schenley by Hedgeside, and are now held by the former.

(c) The rest of the 8,933 barrels of alcoholic products, totaling 2,759 barrels of whisky, were purchased by Schenley from Heaven Hill, by oral contract made in December, 1947, and performed by

the parties in January, 1948. Schenley is now the holder of warehouse receipts Nos. 3681B, 3682B, 3683B, and 3684B issued by Hedgeside to Schenley covering that whisky, now stored in bond in No. 2. These 2,759 barrels of whisky were originally produced by Franciscan at its distillery at Yountville, and were continuously stored since production in No. 2, subject to warehouse receipts issued from time to time to the respective owners by Hedgeside as follows:

Concurrently with its production between October, 1946, and January, 1947, 2,861 barrels of whisky—of which the said 2,759 are a part—were sold by Franciscan to Barnhill, a wholly-owned subsidiary of Glaser, pursuant to an oral agreement. The whisky was stored in bond in No. 2 as produced, and its sale to Barnhill was completed within a few days of production by delivery of Hedgeside receipts to Barnhill, in exchange for the agreed purchase price of \$162,316.50, which was paid to Franciscan by Glaser. The parties intended to and did effect a transfer of title to this whisky at the time the receipts were delivered to Barnhill. The original purchase price was later reduced to \$130,951.44 by a credit memorandum from Franciscan to Barnhill, as the result of a compromise.

For a proper understanding of the Bank's argument in connection with this credit memorandum, some elaboration is here necessary.

Marcus Glaser was president of Barnhill and president and general manager of Glaser, which holds all of the stock of Barnhill. He is also the

vice president and one of the directors of Franciscan, which was owned 50 per cent by Glaser.

Despite the fact that Marcus Glaser considered the original price of the whisky purchased from Franciscan to be the market value—\$1 an original proof gallon—he forced Stone, the president and general manager of both Hedgeside and Franciscan, to issue a credit memorandum to Barnhill amounting to \$31,365.06. This credit was given on the strength of a certain “pre-incorporation agreement”, whereby “no one was allowed to buy whisky any cheaper than Barnhill.” Marcus Glaser told Stone “if he (Stone) sold Hedgeside at—whatever the price—, then Barnhill was entitled to the same price”.

Resuming our examination of the Referee’s findings, we learn that Barnhill held all of the warehouse receipts covering these 2,861 barrels from January, 1947, the date of issue of the last receipt, until January 3, 1948, except for two barrels that were disposed of by Barnhill during the period. On January 3, 1948, Barnhill exchanged the receipts covering 2,759 (sic)¹ barrels for four negotiable

¹ This is evidently a clerical error in the Referee’s Findings. The figure should be 2,859, since the 100 barrels of whisky covered by Receipt No. 384, mentioned hereinafter, were not withdrawn until some time during the period “from January to December, 1948”. Nor does the figure “2,759” agree with the number of barrels, italicized here, shown elsewhere in the same paragraph. This same error has been carried over into the Receiver’s certificate, page 10.

warehouse receipts of Hedgeside—Nos. 384, 385, 386 and 387—and in accordance with an oral agreement of sale with Heaven Hill delivered these four negotiable receipts covering these 2,859 barrels to Heaven Hill for \$131,983.70.

Pursuant to the same oral agreement of sale between Heaven Hill and Schenley, Heaven Hill immediately delivered the four negotiable receipts covering the 2,859 barrels² to Schenley for \$150,314.77. Schenley held these receipts from January to December, 1948, except that during this period 100 barrels, covered by Receipt No. 384, were withdrawn by Schenley.² On December 22, 1948, Schenley exchanged the four negotiable receipts, covering 2,759 barrels of the whisky, for non-negotiable ones of Hedgeside—Nos. 3681B, 3682B, 3683B and 3684B—which receipts are still held by Schenley.

The Bank is the holder of duplicate warehouse receipts covering 3,333 barrels of the 8,933 barrels of whisky and spirits, the said duplicate receipts having been pledged by Hedgeside to secure loans made by the Bank to Hedgeside, as follows:

On January 4, 1949, Hedgeside pledged to the Bank as security for a loan its warehouse receipt No. 3689B, purporting to cover 574 barrels of the 3,191 barrels of grain spirits described in subdivision (a), *supra*. These 3,191 barrels had been purchased by Schenley from Hedgeside between October, 1947, and March, 1948. At the time of the pledge to the Bank, Schenley was the holder of valid

² See Note 1.

Hedgeside warehouse receipts for the same 574 barrels of grain spirits, as follows:

No. of Barrels and Serial Numbers	No. and Date of Issue of Schenley's Warehouse Receipts	No. and Date of Issue of the Bank's Warehouse Receipts
69 70228-296	3525B (11-24-47))))))))))) 3689B (1-5-49)
27 70942-968	3538B (Undated)	
50 70969-71018	3539B (12-8-47)	
74 71069-71142	3541B (12-10-47)	
96 71143-71238	3543B (12-11-47)	
85 71239-71323	3544B (12-12-47)	
150 71324-71473	3545B (12-15-47)	
23 71474-71496	3545B (12-15-47)	

574 Barrels

All of the above warehouse receipts now held by Schenley for the 574 barrels of spirits were issued by Hedgeside and delivered by it to Schenley pursuant to the production contract described in subsection (a), supra,³ more than one year prior to the issue and pledge by Hedgeside of Receipt No. 3689B to the Bank. Receipt No. 3538B, undated, was delivered to Schenley on or about December 9, 1947. Schenley's warehouse receipts for these 574 barrels were delivered through the Bank, which acted as the collection agent for Hedgeside and delivered the warehouse receipts to Schenley in exchange for payment of Hedgeside drafts. The Bank had actual knowledge of the delivery to Schenley of the receipts covering the 574 barrels to Schenley.

At all times since the delivery to it of the ware-

³ There are two "production contracts" mentioned in subsection (a). The Referee evidently has in mind the contract of October 13, 1947.

house receipts, Schenley has retained all the indicia of ownership of the 574 barrels, and Hedgeside was at no time clothed with the apparent ownership of that property, but held only the naked possession thereof in its capacity as a bonded warehouseman. Warehouse receipt No. 3689B was issued and pledged by Hedgeside to the Bank without Schenley's knowledge, authority, or consent, and the Bank in accepting the receipt relied solely on the mere possession of the property by Hedgeside, as the proprietor of a Government bonded warehouse. In accepting that receipt the Bank was not misled by any act or omission on the part of Schenley or of any one acting on its behalf.

Between June 17, 1947, and September 16, 1948, Hedgeside pledged to the Bank as security for loans to Hedgeside its warehouse receipts purporting to cover the said 2,859 barrels of whisky, described in subsection (c), *supra*. This whisky had been produced by Franciscan and sold by it to Barnhill as produced. The numbers and the dates of issue of the warehouse receipts pledged by Hedgeside to the Bank are as follows:

No.	Date of Issue	No. of Barrels
3469-B	6-17-47	225
3470-B	6-17-47	735
3472-B	7-30-47	100
3474-B	9-10-47	100
3475-B	9-16-47	200
3476-B	9-16-47	200
3477-B	10-22-47	200
3548-B	12-17-47	200
3552-B	9-16-48	899

2,859

As set out in subsection (c), supra, at the time of the above purported pledges to the Bank, Schenley or Schenley's predecessors in title were the holders of valid warehouse receipts covering the said 2,859 barrels of whisky, then stored in No. 2, the last receipt for said whisky having been issued to Barnhill more than four months before the first warehouse receipt for the same whisky was pledged to the Bank.

Schenley, or Schenley's predecessors in title—Heaven Hill and Barnhill—at all times since the delivery to them of their warehouse receipts covering the whisky, retained all the indicia of ownership of the liquor, and Hedgeside was at no time clothed with the apparent ownership of that property but held only the naked possession thereof as a bonded warehouseman. The warehouse receipts listed above held by the Bank were issued and pledged by Hedgeside to the Bank without the knowledge, authority, or consent of Franciscan, the original producer of the whisky, and without the knowledge, authority, or consent of the said subsequent purchasers of the liquor and holders of valid warehouse receipts therefor—Barnhill, Heaven Hill, and Schenley. In accepting its said warehouse receipts from Hedgeside, the Bank relied solely upon the mere possession of the whisky by Hedgeside as proprietor of a Government bonded warehouse. In accepting its warehouse receipts, the Bank was not misled or deceived by any act or omission on the part of Schenley or its predecessors in title—Barnhill, Heaven Hill, and

Franciscan—nor did it suffer detriment because of any act or omission of theirs.

At all times herein mentioned, up to the date of the filing of the involuntary petition in bankruptcy, Hedgeside's No. 2 held a permit to operate that warehouse duly issued by the United States, Alcohol Tax Unit Form 27-D, and at all of said times it held a "Distilled Spirits Manufacturer's License" and a "Public Warehouse" license, duly issued by the Board of Equalization of California. Hedgeside did not advertise for or solicit customers for the storing of spirits and whisky, and did not regularly store goods for the public generally, but in the regular course of its business Hedgeside stored in bond whisky and spirits produced in its own distillery, and whisky and spirits owned by a limited number of persons licensed to deal in bulk whisky and spirits, with whom Hedgeside did business. Hedgeside charged a reasonable rate in the regular course of business for such storage.

The principal place of business of Hedgeside and its No. 2, at all times herein mentioned, was at Napa, and at all of the said times copies of warehouse receipts issued by Hedgeside covering whisky and spirits stored in bond at No. 2 were kept at the said principal place of business and at the said warehouse.

At all times herein mentioned and during the year 1948, the Bank was not a creditor of Franciscan.

The Referee's conclusions of law were:

Schenley was and is a bona fide purchaser of the 8,933 barrels of whisky and spirits.

At the time Hedgeside pledged to the Bank the duplicate warehouse receipts for the 574 barrels of spirits, Hedgeside was not the owner of the spirits, nor did it have any right, title, or interest in them except as Schenley's bailee, Schenley being the owner of the spirits and the holder of valid warehouse receipts for them. The Bank has no interest whatsoever in the 574 barrels.

Hedgeside was at no time the owner of the 2,759 barrels of whisky, nor did it have any right to the whisky except as bailee; and Hedgeside's pledge to the Bank of duplicate receipts for the liquor carried no interest in it to the Bank. Prior to that pledge, the whisky, consisting of 2,859 barrels, had been sold by Franciscan, the producer and original owner, to Barnhill, which thereby became the owner of the whisky and which passed good title thereto to Heaven Hill, Schenley's predecessor in title. The Bank has no interest in any of the 8,933 barrels of whisky and spirits.

When alcoholic products manufactured by Franciscan were transferred into storage in Hedgeside's No. 2, concurrently with their sale, there was an immediate delivery and an actual and continued change of possession, within the meaning of Section 3440. (The Referee thrice erroneously cites the Code of Civil Procedure instead of the Civil Code.)

At all times prior to the filing of the bankruptcy petition, Hedgeside was a warehouseman as defined in the California Uniform Warehouse Receipts Act, and at all times was lawfully engaged in the business of storing goods for profit. Hedgeside was au-

thorized to and did issue valid warehouse receipts for goods so stored, including the receipts now held by Schenley for the 8,933 barrels. Hedgeside was not a "public utility" under the Public Utilities Act of California.

When Hedgeside issued its receipts as bailee for the 8,933 barrels stored in No. 2, the California Uniform Warehouse Receipts Act was the exclusive statute governing the transfer of title to that merchandise and the ownership thereof, for all purposes, and Section 3440 had and has no application thereto.

Hedgeside and Franciscan were the lawful proprietors of United States Bonded Warehouses No. 2 and No. 111, respectively. The transfer of all or part of the 8,933 barrels subjected the alcoholic products to the Internal Revenue Code of the United States and to the regulations promulgated thereunder; and said transfers concurrently with the sale of said products were accompanied by an immediate delivery and an actual and continued change of possession within the meaning of Section 3440.

When Hedgeside issued its warehouse receipts to Schenley for the 8,933 barrels, Hedgeside recognized and confirmed the conveyance to Schenley by the making of the storage contract contained in the receipts. As bailee for Schenley, Hedgeside was and is estopped from disputing Schenley's title as against Hedgeside.

Hedgeside, its estate, and the Trustee in Bankruptcy, have no right, title, or interest, either legal or equitable, in the 8,933 barrels or any part thereof.

Schenley is the exclusive owner of the barrels and is entitled to the immediate possession thereof.

The Referee ordered that Schenley's reclamation petition be granted, and the Trustee was directed to deliver forthwith the 8,933 barrels to Schenley.

6. The Petition for Review

On February 19, 1952, the Trustee and the Bank filed a Petition for Review of the Referee's Order. While the Petition ostensibly specifies a number of alleged errors in the Referee's "findings of fact", most of the so-called "findings" objected to are in reality conclusions of law. For example, the very first objection is directed to the Referee's finding that Schenley holds "warehouse receipts" for the 8,933 barrels of whisky and grain spirits. That finding is attacked on the ground that the purported "warehouse receipts" are not valid "since none of said documents were issued by a 'warehouseman' as defined by the applicable laws of the State of California, a requirement in order to avoid Section 3440 of the Civil Code". Since in the very same sentence the Trustee and the Bank admit that Schenley does in fact hold "documents purported on their face to be 'warehouse receipts' * * *", it is clear that the objection involves simply a question of law; i.e., are the admittedly-held documents valid?

Be that as it may, the Trustee and the Bank themselves in their briefs not only admit but insist that there are no conflicts in the evidence to be resolved by this Court. The very first words of their main brief are: "There is no dispute as to the material

facts involved in this proceeding, * * *"; and the very first sentences of their closing brief are:

"At the outset we wish to make clear to the Court the fact that though there were many days of trial and therefore a long reporter's transcript there are no disputed facts, i.e., the Referee was not called upon to weigh and resolve conflicting evidence. The Referee arrived at the result he did by drawing conclusions of law from uncontradicted facts which we contend in our petition here were clearly erroneous and contrary to the established law of California. At the oral argument this Court requested each side to point out any facts disputed. We know of none * * *"

This Court is inclined to agree with the Trustee and the Bank that there are no substantial issues of fact presented to it for determination.

That being the case, the only questions presented here are those of law. In such a situation, it is familiar doctrine that a reviewing court must exercise its independent judgment. "The presumption of correctness of the referee's findings is not extended by General Order XLVII (see 11 USCA foll. section 53) to his conclusions of law." 8 Remington on Bankruptcy, 5th ed., section 3719, page 38. See also *Weisstein Bros. and Survol v Laugharn*, 9 Circ., 84 F 2d 419, 420 (1936).

7. The Questions Presented

On March 6, 1952, the Referee, in conformity with the provisions of 11 USCA section 67(a)(8), filed his Certificate on the Petition for Review. The

“Statement of Questions Presented”, which forms part of the Certificate, reads in part as follows:

“The order being reviewed states that Stanley * * * is the owner and entitled to the immediate possession of 8,933 barrels of whiskey and grain spirits that were in the possession of the * * * bankrupt as of the date of bankruptcy. Schenley * * * holds documents purporting on their face to be warehouse receipts covering all of the property sought to be reclaimed. The Trustee in Bankruptcy contends that the transfer of said property to Schenley * * * is invalid as to creditors of said bankrupt, since the reclamation petitioner failed to take possession of said property as required by Section 3440 * * * The Trustee * * * also contends that the documents designated ‘warehouse receipts’ are insufficient in law to avoid the effect of said Section 3440, claiming that the issuer of said receipts was not a ‘warehouseman’ as defined by the Uniform Warehouse Receipts Act and the applicable California statutes, and, therefore, not within the exception of Section 3440.5 of said Civil Code. The * * * Bank * * * has set up a claim of title in itself as to a portion of said whiskey and spirits, due to a pledge made to it by the bankrupt and based on duplicate warehouse receipts.”

Since diverse principles of law are applicable to the various lots of whiskey and grain spirits that figure in this litigation, the different groups into which the 8,933 barrels of alcoholic products are

divided will be considered separately.

The rights of the Bank, if any, will first be discussed.

8. Schenley's Title to the 574 Barrels of Spirits is Superior to That of the Bank

As we have seen, on January 4, 1949, Hedgeside pledged to the Bank as security for a loan its warehouse receipt purporting to cover 574 barrels of the 3,191 barrels of grain spirits hereinbefore described. These 574 barrels had already been purchased by Schenley from Hedgeside between November 24, 1947, and December 15, 1947, according to Schenley's warehouse receipts. In other words, Hedgeside had nothing to pledge, so far as those barrels were concerned, when it delivered its purported "warehouse receipt" of January 5, 1949, to the Bank. The Bank admits that Schenley's warehouse receipts are prior in point of time.

It is well settled that the rule that an assignee acquires no better title than his assignor applies to a sale of non-negotiable warehouse receipts. In *San Angelo Wine & Spirits Corporation vs. South End Warehouse Company*, 19 C.A. (2d) (Supp) 749, 758 (1936), it was said:

"In the case before us the plaintiff received an assignment of a nonnegotiable warehouse receipt, which expressly set forth that the warehouseman claimed a lien for all lawful claims for money advanced as well as for charges and outlays of the kinds enumerated in section 27 of the Uniform Warehouse Receipts Act. The

plaintiff, as assignee of Western Distillers Corporation, had no stronger right than that company itself; * * *”

Furthermore, the Referee found that the Bank acted “as collection agent for Hedgeside” in delivering the warehouse receipts to Schenley in exchange for the payment of the Hedgeside drafts. Thus the Bank had actual knowledge of the delivery to Schenley of the receipts covering the 574 barrels in question. Miss Elouise Jones, assistant to the supervisor of Schenley’s “cashier, contract, and lease departments”, gave detailed testimony regarding the manner in which she took the money to the Bank and picked up the warehouse receipts, the paid sight drafts, and the original invoices.

In their Petition for Review, however, the Trustee and the Bank strenuously object to the Referee’s Finding that the Bank had actual knowledge of the Bank’s delivery of the warehouse receipts to Schenley. They contend that “a bank, in functioning as a lending agent, is not charged with notice of matter coming to the attention of an employee in the collection department, where there was no obligation or duty on said employee to transmit such notice to a proper officer or managing agent of the bank”.

This precise argument, which happens to have been made by another national bank in this State in at least two cases during the last fifteen years, has been vigorously repudiated by the Supreme Court of California. In *Sanders vs. Magill*, 9 C. (2d) 145, 153-154 (1937), the Court said:

“Knowledge of an officer of a corporation within the scope of his duties is imputable to the corporation. (Many cases cited.) Appellant (bank) admits that the law is correctly stated in these authorities, and that certain of its officers knew at the time of the sale of said note that the water stock was pledged for the payment of the balance due on said promissory note and that it had never been sold to satisfy said balance or any part thereof. It contends, however, that while certain officers had this information, the officers or agents who negotiated the sale of said note to Magill had no such information, and that they dealt with Magill without any notice of the true status of said water stock * * * Appellant’s counsel concede that they have found no authority which supports this contention, but nevertheless assert that the position of appellant in this respect is both sound and reasonable. We are not inclined to agree with this statement. It is diametrically opposed to the well-established rule of law above stated that notice to the agent or officer of a corporation is imputable to the corporation itself. Furthermore, such a rule, in our opinion, is fraught with danger and would open up avenues of fraud which would lead to incalculable hazards. It would permit a corporation, by not letting its right hand know what is in its left hand, to mislead and deceive those who are dealing with it in perfectly good faith. We are

not prepared at this time to pioneer in this field of jurisprudence.” (Emphasis supplied.)

See also *Vanciel vs. Kumle*, 26 C. 2d 732, 734 (1945).

9. The “Heaven Hill” Whiskey

One of the most troublesome groups of merchandise to be here considered is the one comprising the 2,759 barrels of whiskey purchased by Schenley from Heaven Hill. As the Bank and the Trustee themselves trace the chain of Schenley’s title, “The whiskey so purchased (from Heaven Hill) was produced by Franciscan, then sold by it to Barnhill * * * which in turn sold to Heaven Hill, the predecessor in interest of Schenley”. The intricate details of Schenley’s and the Bank’s conflicting claims have already been fully set forth in the summary of the Referee’s findings, *supra*.

It will be remembered that the last receipt for the whisky was issued to Barnhill in January, 1947, more than four months before the first warehouse receipt for the same liquor was pledged to the Bank by Hedgeside, which at no time owned the whisky in question.

As the Bank points out, “this attempted disposition of the same goods to two different persons (sic) was the result of the actions of one Richard I. Stone, president and general manager of Hedgeside and Franciscan. Said Stone is now serving a sentence for theft in San Quentin.”

In the case of *In re Harbor Stores Corporation*,

DC N.Y., 29 F. Supp. 749, 751 (1939), the Court said:

“It is undisputed that the warehouse receipts originally given to the Trust Company were fraudulently issued by the Insular Corporation. They stood for no actual deposits of cocoa beans in the warehouse by any of the Garcia companies or by the Trust Company but were mere duplicating receipts purporting to cover property clearly shown to belong to others. These fraudulent receipts were complete nullities as against the real owners of the goods. (Cases cited.) And their subsequent exchange for warehouse receipts of the bankrupt in no way changed their character. (Case cited.) * * * * Neither is there any basis for an estoppel against the real owners of the property. (Case cited.) Nor is the good faith of the Trust Company at all material.” (Emphasis supplied.)

Nor did the issuance of the credit memorandum from Franciscan to Barnhill, reducing the original purchase price, *supra*, affect Barnhill’s title to the whisky. There is no merit to the Bank’s contention that “Since Barnhill never actually paid the contracted price, it never received title, and it consequently was unable to pass title to Heaven Hill, or Heaven Hill to pass title to Schenley”.

The Referee found that after the original purchase price was paid, as a result of a compromise the figure was reduced and a credit memorandum was issued by Franciscan to Barnhill. When the

seller makes a partial refund, a different legal situation is created from that which is present when the seller has not been paid at all.

Furthermore, unless the contract so specifies, payment does not affect the passage of title. Section 1739 of the Civil Code of California reads in part as follows:

“Rules for ascertaining intention. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

“Rule 1. (Goods in deliverable state.) Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

* * * * *

“Rule 4. (Appropriation of unascertained goods.) (1) Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied and may be given either before or after the appropriation is made.”

See also *Otis vs. Overland Terminal Warehouse*

Company, 18 C.A. (2d) 157, 161 (1936), hearing denied by the Supreme Court of California (1937).

Similarly, where there is a sale by invoice, draft, and warehouse receipts, title passes when there is "an acceptance and payment of the draft". *Henderson vs. E. Lauer & Sons*, 40 Cal. App. 696, 698 (1919); *Alonso vs. Badger*, 58 C.A. 2d 752, 758 (1943), hearing denied by the State Supreme Court (1943).

With particular reference to warehouse receipts, we find the rule thus stated in 55 A.L.R. 1116:

"As in case of a bill of lading, a warehouse receipt is, in ordinary commercial transactions, regarded as the symbolical representation of the property, and its transfer and delivery are upheld as a valid transfer of the legal title to the property represented thereby."

The Bank insists that because of the "proven ability" of Glaser "to force the price downwards by making claims against Stone, no sums sent Franciscan by Barnhill can be regarded as turned over for Franciscan's unfettered control." If we give the maximum weight to this argument—which, as has been stated, this Court does not consider valid—the Bank's position is not improved. Barnhill's title, at the very worst, was only voidable by Franciscan because of Glaser's insistence that Franciscan grant it a credit.

But Franciscan made no effort to avoid the sale to Barnhill before the latter sold the whisky to Heaven Hill. Therefore, even according to the

Bank's theory, Barnhill and its successors in interest acquired a good title.

Section 1744 of the California Civil Code reads as follows:

“Sale by one having a voidable title. Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title.”

See also *Keegan vs. Kaufman Bros.*, 68 C.A. 2d 197, 202 (1945).

The Bank complains that “during the period that Stone was borrowing from the Bank by pledging the warehouse receipts now held by the Bank and covering the Heaven Hill whiskey, Marcus Glaser, president of Barnhill, knew that Stone had been borrowing through Hedgeside representing that Hedgeside owned Franciscan-produced liquor.” It is further urged that “Nothing was done by Marcus Glaser or Franciscan other than to bill Hedgeside in order to protect Glaser, and despite Marcus Glaser's knowledge of Stone's fraud in this connection, Marcus Glaser neither notified the Bank nor acted to replace the Franciscan management,” etc.

As we have seen, however, the Referee specifically found that the warehouse receipts held by the Bank were pledged by Hedgeside without the knowledge of Franciscan or the successive purchasers of the whisky—Barnhill, Heaven Hill, and Schenley; that the Bank, in accepting the receipts from Hedgeside,

relied solely on the mere possession of the whisky by Hedgeside as proprietor of a Government bonded warehouse; and that in accepting the receipts, the Bank "was not misled or deceived by and did not suffer detriment because of any act or omission on the part of (Schenley) or of (Schenley's) predecessors in title, Barnhill * * *, Heaven Hill * * *, and Franciscan * * *."

The above is a finding of fact; and both the Bank and the Trustee have told us emphatically that "there are no disputed facts".

To labor the question of Schenley's blamelessness in the matter of Hedgeside's pledge to the Bank would therefore be a work of supererogation.

10. The Mountain View Spirits

In 1947-1948, Schenley purchased from Franciscan 900 barrels of grain spirits produced at Mountain View. These barrels were first stored at No. 111, but in the latter part of 1948 were transferred in bond to No. 2.

Both the Bank and the Trustee attack this sale on the ground, *inter alia*, that the postponement in the transfer from No. 111 to No. 2 makes the transaction invalid, by virtue of Section 3440. At present, however, there is being considered only the Bank's status as creditor, to give it standing to make such a claim.

The pertinent part of the section follows:

"Every transfer of personal property, other than a thing in action, or a ship or cargo at sea or in a foreign port, and every lien thereon,

other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or encumbrancers in good faith subsequent to the transfer; * * *."

Section 3340.5 of the Civil Code is as follows:

"Section 3440 of this code shall not apply to goods in a warehouse where a warehouse receipt has been issued therefor by a warehouseman as defined in the Warehouse Receipts Act, and a copy of such receipt is kept at the principal place of business of the warehouseman and at the warehouse in which said goods are stored. Such copy shall be open to inspection upon written order of the owner or lawful holder of such receipt."

Aside from the point that a transfer into bond is a sufficient change of possession, which will be discussed *infra*, it may be observed that only a creditor of Franciscan during the period between December, 1947, and December, 1948—when Fran-

ciscan was in possession of the spirits—could, under Section 3440, challenge the sale to Schenley. The only evidence put in by the Bank on this phase of the case is to the effect that as of the time of the trial, October, 1950, Franciscan owed the Bank \$3,929.54. That is a far cry from Franciscan's position as debtor "while * * * in possession" of the spirits.

To establish itself as Franciscan's creditor, however, the Bank invokes the provision of Section 3439.01 of the Civil Code, which reads in part as follows:

"'Creditor' is a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent."

The Bank puts forth four elaborate theories under which it contends it has a "contingent" claim against Franciscan "running back as early as 1948". This claim, it is argued, is sufficient to give the Bank the status of "creditor" within the ambit of Section 3439.01, *supra*.

The Bank's finespun and farfetched reasoning can best be expressed in its own words:

"* * * Stone, by virtue of the pre-incorporation agreement and the manner in which the other directors permitted him to operate Franciscan, was enabled to finance Franciscan as he chose. Commencing in 1946 Stone followed a practice of using Hedgeside as a conduit for Franciscan's borrowing. In other words, Stone ostensibly borrowed for Hedgeside, but actually

gave the money to Franciscan. Similarly, Stone represented to the Bank that Hedgeside owned the security pledged, whereas actually Franciscan owned the security. Marcus Glaser knew of this practice as early as July, 1947. Nevertheless, the only action taken was to ratify Stone's conduct by memorandum billing by Franciscan against Hedgeside (in order to protect Glaser). The effect of this course of conduct was to make Franciscan liable to the Bank on the notes executed with respect to the so-called 'Heaven Hill purchase' as an undisclosed principal."

Out of this statement of fact, the Bank spins four "causes of action", based upon (a) contract, (b) deceit, (c) negligence, and (d) constructive trust. In connection with the theory of "negligence", the Bank tells us that it is asserting Franciscan's "own" negligence, "not any theory of respondeat superior". As to the constructive trust, the Bank says:

"The books and records of Franciscan show that large sums were received by Hedgeside during the period that Hedgeside was the ostensible borrower from the Bank in connection with warehouse receipts now held by the Bank. A fair inference may be drawn from the evidence that the money Hedgeside turned over to Franciscan came from the Bank, which makes Franciscan a constructive trustee for the Bank for sums so received."

It is difficult to see how these collateral and complicated "causes of action" against Franciscan can

spell out a creditor-debtor relation between the Bank and Franciscan to the prejudice of Schenley, which in good faith paid for the spirits in question and received warehouse receipts therefor.

The Referee found as a fact that "during the year 1948 Anglo Bank was not a creditor of Franciscan * * *" This Court believes that finding to be correct.

11. The Alter Ego Arguments

Next, let us examine the claims of the Trustee.

To attack Franciscan's sales to Schenley by invoking Section 3440, the Trustee must establish himself as a creditor of Franciscan. It is insisted that, unlike the Bank, the Trustee bottoms his claim to a status of creditor of Franciscan upon "the alter-ego relationship between Hedgeside and Franciscan". The Trustee further maintains that "'alter-ego' applies solely to the question of whether or not the Trustee has creditor status; it has nothing whatsoever to do with the entirely separate and distinct problem of whether or not a change of possession from Franciscan to Hedgeside satisfied Section 3440, which is solely a question of statutory construction".

This Court believes that the Trustee is here endeavoring to make a doctrinaire distinction between tweedledum and tweedledee. In any event, the Trustee's position will not be prejudiced if the two theories are considered together.

It is contended that "for all practical purposes the two corporations were merely separate names

for the one business enterprise of their common president", Stone.

There were purchased by Schenley from Franciscan or its successors in title a total of 4,118 barrels of whisky and grain spirits, as follows:

(1) The Heaven Hill whisky, consisting of 2,759 barrels; chain of title: Franciscan to Barnhill to Heaven Hill to Schenley.

(2) Grain spirits, 459 barrels, purchased by Schenley from Franciscan via Stone.

(3) Grain spirits, 900 barrels, purchased by Schenley direct from Franciscan.

Of these three lots of merchandise, only No. 3 was not immediately stored in Warehouse No. 2. This third lot of 900 barrels was warehoused in No. 111 from various dates between December, 1947, and April, 1948, until November and December, 1948, when it was transferred in bond to No. 2.

Schenley objects that the "alter ego" argument constitutes an "affirmative defense" and therefore should have been specifically pleaded. In the Court's view of the case, however, it is not necessary to consider this highly technical contention, since the rights of the parties can be determined on a far sounder basis.

It may be assumed, then, for the sake of the argument, that the Trustee is in a pleading position to urge the alter ego theory.

It is well settled in California and elsewhere that "before the acts and obligations of a corporation may be recognized as those of a particular person under the alter ego doctrine, it must be shown that

an adherence to the corporate entity under the particular circumstances would sanction a fraud or promote injustice". *Wiseman vs. Sierra Highland Mining Company*, 17 C. (2d) 690, 698 (1941).

The correct and salutary rule was thus succinctly stated in the case of *In re New York Title & Mortgage Co.*, 14 N.Y.S. 2d 570, 571 (1939), unanimously affirmed, 17 N.Y.S. 2d 224 (1939), appeal denied, 282 N.Y. 810, 27 N.E. 2d 819 (1940):

"The corporate veil may at times be pierced to do equity and justice, but never to accomplish the reverse."⁴

Schenley bought and paid for the merchandise in question. A finespun theory of alter ego should not deprive it of its purchase.

12. The Trustee, as the Representative of Hedge-side, Cannot Attack the Delayed Transfer of the 900 Mountain View Barrels.

There has already been discussed the Bank's attack upon Schenley's purchase of the 900 barrels of

⁴ See also *Hollywood Cleaning & Pressing Co.*, 217 Cal. 124, 130 (1932); *Dos Pueblos Ranch & Improvement Company v Ellis*, 8 C. (2d) 617, 621 (1937); *Schmitt v Northern Counties Land and Cattle Company*, 108 Cal. App. 688, 691 (1930); *Davis v Perry*, 120 Cal App 670, 674-675 (1932); *Estate of Greenwald*, 19 C. A. (2d) 291, 295 (1937), hearing denied by the State Supreme Court (1937); *Loughran v Reynolds*, 53C.A. (2d) 250, 252-253 (1942) petition for hearing by the State Supreme Court denied (1942); *Campbell v Birch*, 53 C.A. (2d) 399,406 (1942), petition for a hearing by the State Supreme Court denied (1942); *Spear v H. V. Greene*, Mass., 140 N. E. 795, 798 (1923); *In re Lawyers Mortgage Co.*, 15 N.Y.S. 2d 239, 244 (1939).

grain spirits produced at Mountain View. That attack was based upon the ground, inter alia, that the postponement in the transfer from No. 111 to No. 2 makes the transaction invalid.

Next to be considered is the Trustee's assault upon the same purchase, as a representative of Hedgeside, which is a creditor of Franciscan.

Under 11 USCA Section 110(e), the Trustee may avoid any transfer by the bankrupt which any creditor of the bankrupt might have avoided. In this instance, however, the "creditor" is not a creditor of the bankrupt, but the bankrupt itself.

But, as the Trustee points out, the Trustee represents not only the bankrupt's creditors, but the bankrupt itself. It is in this latter capacity that the Trustee seeks to avoid the sale of the 900 barrels of spirits by Franciscan to Schenley.

The Referee concluded, as a matter of law, that Hedgeside, when it "issued its warehouse receipts for all or part of the said 8,933 barrels of whiskey and spirits, * * * recognized the conveyance to (Schenley) of said goods and confirmed said conveyance by the making of the storage contract contained in said warehouse receipts, and Hedgeside as bailee for (Schenley) was and is estopped from disputing (Schenley's) title to said goods as against Hedgeside".

Although the Trustee and the Bank, in their petition for review filed in this Court, vigorously attack most of the conclusions of law announced by the Referee, they leave unassailed the one dealing with Hedgeside's estoppel as bailee.

From this somewhat conspicuous hiatus, Schenley argues, probably correctly, that the Trustee has abandoned the point. Nevertheless, for the sake of completeness, this Court will consider it briefly.

As we have seen, the 900 barrels were transferred from Franciscan's No. 111 to Hedgeside No. 2 in November and December, 1948. At that time, according to the Referee's Findings, "the warehouse receipts for said barrels now held by (Schenley) were issued to (Schenley) by Hedgeside".

In December, 1948, then, Hedgeside became Schenley's bailee for the barrels in question. It is hornbook law that, as such bailee, Hedgeside cannot dispute Schenley's title to the spirits.

In 56 Am. Jur., Warehouses, section 27, pages 333-334, the rule is thus stated:

"In accordance with the well-settled general rule that a bailee is estopped to deny his bailor's title, a warehouseman with whom goods have been deposited is estopped, in the absence of the intervention of a paramount title, from disputing the title of the depositor. Under this doctrine, a warehouseman may not set up a title another does not assert, for the purpose of appropriating the stored goods to his own use."

See also 6 Am. Jur., Bailments, section 96 et seq., page 245 et seq.

The same doctrine has been embodied in the Warehouse Receipts Act of California, Act No. 9059, Deering's California General Laws, vol. 3, p. 3419. Section 16 reads as follows:

"Title of warehouseman. No title or right

to the possession of the goods, on the part of the warehouseman, unless such title or right is derived directly or indirectly from a transfer made by the depositor at the time of or subsequent to the deposit for storage, or from the warehouseman's lien, shall excuse the warehouseman from liability for refusing to deliver the goods according to the terms of the receipt."

In 12 Cal. Jur., *Fraudulent Conveyances*, section 22, page 980, it is said:

"A creditor may waive his right to avoid a fraudulent conveyance. Likewise his conduct may raise an estoppel as to him. Consequently, where the creditor recognizes the conveyance or makes any statement or agreement confirming it, upon the faith of which the grantee acts as he would not otherwise—such as expending money on the property—the creditor will be estopped to deny the validity of the conveyance." (Emphasis supplied.)

Since Hedgeside would have been estopped from questioning Schenley's title, the Trustee, as a representative of Hedgeside, is likewise estopped from doing so. In 4 Remington on Bankruptcy, 5th ed., section 1412, page 100, the rule is thus stated:

"The Trustee takes title to all property which passes to him by operation of law under subdivision (a), section 70, 11 USCA, section 110, subject to all equities existing against the bankrupt at the time of the filing of the petition. He gets no more and no less than the bankrupt was

entitled to at the time of the filing of the petition. It has been said that he stands in the shoes of the bankrupt.”

For the above reasons, the Trustee is not in a position to attack the delayed transfer of the 900 barrels of Mountain View grain spirits from No. 111 to No. 2.

13. “The Real Basic Issue”

Although the parties have filed with the Referee and with this Court briefs dealing with many legal aspects of this case, and aggregating 263 pages in length, the Trustee and the Bank, in their closing memorandum, solemnly assert:

“The real basic issue in this case is whether or not Schenley’s failure to transfer possession of the barrels of whiskey and spirits purchased rendered the transactions void under Section 3440. This issue is involved in the case of each of the 8,933 barrels.”

While this seems to be something of an oversimplification, it is undoubtedly true that the most important problem in this complicated litigation is the impact, if any, of that oft-invoked section upon the ultimate rights of the parties. Indeed, it is only by etching out the ancillary matters just discussed that one can bring out Section 3440 into proper relief.

(a) Section 3440 No Longer Governs in a Case of This Type.

The Court of Appeals for this Circuit has held that the California Warehouse Receipts Act, *supra*,

has repealed Section 3440 insofar as it might otherwise apply to warehoused goods. This ruling of our Appellate Court is found in the case of *Heffron vs. Bank of America National Trust and Savings Association*, 9 Cir., 113 F. 2d 239, 242-243 (1940), 133 ALR 203. In that case, the court said:

“Indeed, the general scheme of the Warehouse Receipts Act to achieve uniformity, and to effect the secure and ready use of warehouse receipts as instruments of credit, is inconsistent with the notion that the business world must look to something other than the observance of the definite and comprehensive terms of the act itself. Compare *Jewett vs. City Transfer & Storage Co.*, 128 Cal. App. 556, 18 P. 2d 351.

“We conclude that the Warehouse Receipts Act repealed section 3440 so far as the latter might otherwise apply to warehoused goods.

“The enactment in 1939 of section 3440.5 of the Civil Code may fairly be considered as a move to clarify existing law or to remove doubts of the nature prompting the present litigation.”

Our Court of Appeals has steadfastly adhered to the doctrine announced in the *Heffron* case, *supra*. In *Sampsell vs. Lawrence Warehouse Co.* 9 Cir., 167 F. 2d 885, 886 (1948), certiorari denied, 335 U.S. 820-821 (1948), the Court quoted from the *Heffron* decision with approval, and also gave an extensive excerpt from *Commercial National Bank of New Orleans vs. Canal-Louisiana Bank & Trust Company*, 239 U.S. 520, 528-529 (1916). In that case the Supreme Court said:

“It is apparent that if these uniform acts are construed in the several states adopting them according to former local views upon analogous subjects, we shall miss the desired uniformity, and we shall erect upon the foundation of uniform language separate legal structures as distinct as were the former varying laws.”⁵

(b) Hedgeside Stored Goods “For Profit”.

It is necessary, therefore, to consider the rights of the parties in the light of the California Warehouse Receipts Act. For a proper appraisal of those rights, however, we must first glance at some Federal statutory provisions governing distilleries.

The products of a distillery, when “removed from the place where they were distilled and not deposited in bonded warehouse as required by law” are subject to a tax amounting to several times their value and collectible “immediately”. 26 USCA Section 2800 (b)(2). Many distillers operate an Internal Revenue Bonded Warehouse, where the merchandise can be stored for eight years without payment of a tax. See 26 USCA Sections 2872 and 2879 (b).

⁵ See also *Barry v Lawrence Warehouse Co.*, 9 Cir., 190 F 2d 433, 437-438 (1951); *Bradley v St. Louis Terminal Warehouse Company*, 8 Cir., 189 F 2d 818, 823 (1951); *Jewett v The City Transfer & Storage Co.*, 128 C. A. 556, 562 (1933), hearing denied by the State Supreme Court (1933); *Sampsell v Security-First Nat'l. Bank of L. A.*, 92 C. A. 2d 648, 651-652 (1949), petition for a hearing denied by the State Supreme Court (1949); 67 C. J. 448, *Warehousemen and Safe Depositaries*, section 8.

As we have seen, the Referee found that in the regular course of its business Hedgeside stored in bond whisky and spirits produced in its own distillery, and whisky and spirits owned by a limited number of persons with whom Hedgeside did business. Hedgeside charged a reasonable rate for such storage. Copies of its warehouse receipts were kept at Hedgeside's principal place of business and at its Warehouse, referred to herein as No. 2, both at Napa.

Furthermore, the Referee found as a fact that Hedgeside held State and Federal permits and licenses to engage in business as a bonded warehouse, to manufacture distilled spirits, and to conduct a "public warehouse".

Under these Findings, Hedgeside was a warehouseman under the Uniform Warehouse Receipts Act, according to Schenley's argument. The Trustee and the Bank deny this, attacking Hedgeside's status as a warehouseman on two grounds.

Section 58 of the Warehouse Receipts Act of California, *supra*, defines "Warehouseman" as "a person lawfully engaged in the business of storing goods for profit".

The record shows that Hedgeside charged 10 cents per barrel per month for storage. In addition, there was a 25-cent "handling charge" for taking each barrel "off of a truck or other conveyance that brought it there, taking it into the warehouse," etc. A similar 25-cent fee was collected when the barrel was taken out. There is also testimony that "when the rate of 10 cents per month" was fixed, there was

no estimate made of whether it would render a profit "on the operation".

From such a showing, it is argued that Hedgeside was not a "warehouseman" as defined by California statute, since it "was not engaged in the business of storing for profit".

In support of his position, the Trustee cites two California decisions involving facts far different from those before this Court, and containing language inferentially adverse to the Trustee's contention.

One case is that of *Sinsheimer vs. Whitely*, 111 Cal. 378, 380 (1896), decided long before the passage of the California Warehouse Receipts Act. There no storage whatever was charged. In the course of its opinion, however, the Court used the following language:

"A warehouse receipt has been defined to be a written contract between the owner of the goods and the warehouseman, the latter to store the goods and the former to pay for that service. (*Hale vs. Milwaukee Dock Co.*, 29 Wis. 488; 9 Am. Rep. 603) * * * But it is said that the tickets were the only vouchers issued by the defendant company, and hence must be treated as warehouse receipts. Rather, it seems to us, that circumstance tends to show that said company was not a warehouseman at all in the sense which the law attributes to that term—an inference corroborated by the fact that it makes no charge for storage. It is only persons

who pursue the calling of warehouseman—that is, receive and store goods in a warehouse as a business for profit—that have power to issue a technical warehouse receipt, the transfer of which is a good delivery of the goods represented by it. (Shepardson vs. Cary, 29 Wis. 42; Bucher vs. Commonwealth, 103 Pa. St. 534; Edwards on Bailments, sec. 332)”. (Emphasis supplied.)

From the foregoing, it will be seen that the expressions “to pay for that service”, “charge for storage”, and “for profit” are used interchangeably.

The other case, Harry Hall & Co. vs. Consolidated Packing Company, 55 C.A. 2d 651, 654 (1942), likewise was one in which no storage was charged. As to the point now under discussion, the Court merely said, citing the Sinsheimer case, *supra*:

“In the present case defendant was not a public or a private ‘warehouseman’ * * *, nor was it to receive compensation for the storage.”

It is difficult to see how the Trustee or the Bank can derive comfort from either of these California cases. They simply are not in point.

In *Fidelity & Deposit Co. vs. State of Montana*, 9 Cir., 92 F. 2d 693, 696 (1937), the Court said:

“That Chatterton & Son was a public warehouseman within the general meaning of the term is not questioned. A storage and handling charge was regularly exacted from all those

using the warehouse facilities and negotiable warehouse receipts were uniformly issued. 67 C.J. 443.”

Section 57 of the Warehouse Receipts Act—a section that seems to have escaped the notice of counsel—provides:

“Interpretation of act. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.”⁶

Since the “law of those states which enact it” includes not only state statutes but also judicial decisions interpreting those statutes, the opinions of state judges in other commonwealths will be helpful here.

In New Jersey Title Guarantee & Trust Co. vs. Rector, 75 A. 931, 932-933 (1910), the New Jersey Court of Errors and Appeals—the highest in the State—construed this identical Section 58 as follows:

“Section 58 declares ‘warehouseman’ to mean a person lawfully engaged in the business of storing goods for profit, and the bill of complaint alleges that the complainant is conducting the business of running safe deposit vaults, and warehousing valuable goods and chattels for hire, which sufficiently describes ‘warehouseman’ as defined by the act, * * *” (Emphasis supplied)

⁶ See also the cases referred to in Subsection (a) of Section 13 of this opinion.

The Uniform Warehouse Receipts Law was construed by the same Court in *New Jersey Manufacturer's Association Fire Insurance Company vs. Galowitz*, 150 A. 408, 409 (1930). There the Court remarked:

“The legal concept of the action comes within the general subject of bailee for hire. The automobiles were stored at a price in defendant's garage. The principle of liability is that of a warehouseman.” (Emphasis supplied)

In *E. V. Webb & Co. vs. Friedberg*, N.C., 126 S.E. 508, 509 (1925), the Supreme Court of North Carolina implied that the mere fact that a receipt gives the “storage rates” indicates that the goods are stored “for profit”. The Court said:

“If the concern is engaged in the business and goods are stored for profit, the statute applies. It matters not if the concern stores its own and also the goods of others (as was done by Hedgeside). The receipt issued terms itself ‘warehouse receipt’ and shows on the face that the goods are stored for profit; it gives the ‘storage rates’.”

(Emphasis supplied)

This Court holds that Hedgeside was engaged in the business of storing goods for profit, within the meaning of the California Warehouse Receipts Act.

(c) Copies of Schenley's Receipts Were Kept at No. 2, As Required By Section 3440.5.

Section 3440.5, *supra*, provides that Section 3440 shall not apply where a copy of the warehouse receipt is kept “at the principal place of business of

the warehouseman and at the warehouse in which said goods are stored". In the Heffron case, our Court of Appeals held that this section "may fairly be considered as a move to clarify existing law or to remove doubts of the nature prompting the present litigation".

The Trustee and the Bank concede that copies of all receipts that Schenley now holds were kept at Hedgeside's "principal place of business". They deny, however, that copies were kept "at the warehouse in which said goods are stored".

The Referee found as a fact that at all times copies of warehouse receipts issued by Hedgeside, covering whisky and spirits stored in No. 2, "were kept at said principal place of business" and "at said warehouse".

Hedgeside had two warehouses that made up No. 2. The Hedgeside office and the storekeeper-gauger's office were in a third building. The receipts were made out in triplicate, and the receipt books were stored in a vault in "a little extra room off of the main office". The space between the building where the office is and "where the warehouse starts" is "a truck and a half".

Apparently because the copies of the warehouse receipts were not kept in the warehouse building itself, the Trustee argues that copies were not kept "at the warehouse".

This Court is not impressed with such hairsplitting. Section 3440.5 requires that "Such copy shall be open to inspection upon written order of the owner or lawful holder of such receipt". Obviously,

a person presenting such an authorization would go to the office building—not to the warehouse structure itself, which Federal law requires shall be “kept securely locked, and shall at no time be unlocked or opened or remain open except in the presence of such storekeeper-gauger or other person who may be designated to act for him”. 26 USCA section 2872.

But perhaps “We must speak by the card, or equivocation will undo us.”

Fernald’s “Connectives of English Speech,” at page 55, has the following:

“At is less definite than in. At the church may mean in, or near the church.”

The Court holds that copies of Schenley’s warehouse receipts were kept at No. 2, as required by Section 3440.5.

14. Regardless of the Uniform Warehouse Receipts Act, Storage in A Government Bonded Warehouse Effects a Change of Possession Within the Purview of Section 3440.

Because of the Government’s tight control over distilleries, it is well settled that storage of alcoholic products in an Internal Revenue Bonded Warehouse constitutes a sufficient change of possession under the Bulk Sales Law.

Not only, as we have seen, are distilled spirits immediately subject to tax, but Section 2872, *supra*, provides for the joint custody of the proprietor of

⁷ Hamlet V i 142-143.

the warehouse and a Government officer, called the "storekeeper-gauger".

Section 2873, as modified by Reorganization Plan No. 26 of 1950, prepared by the President of the United States pursuant to the provisions of the Reorganization Act⁸ of 1949, provides that "The establishment, construction, maintenance, and supervision of internal revenue bonded warehouses shall be under such regulations" as the Secretary of the Treasury shall prescribe.

Section 2879 (a) requires that distillers of all spirits removed to an Internal Revenue Bonded Warehouse shall enter the same for deposit in such warehouse, under such regulations as the Secretary of the Treasury⁹ shall prescribe.

Section 2915 contains detailed instructions regarding the keeping of the storekeeper-gauger's warehouse book.

Referring to the Government's heavy hand upon distilleries, in *Taney vs. Penn National Bank of Reading*, 3 Cir., 187 F 689, 697, 698, 699, 700, 703 (1911), the Court said:

"The tax on whisky is remarkable and distinguished from other excise taxes, by the fact that it is in amount many times the cost of the whisky itself, the tax of \$1.25 a gallon being about five

⁸ See note under 5 USCA section 241, Cumulative Supp. (1950).

⁹ See note 8, *supra*.

times the ordinary value of the whisky at the still.¹⁰ It is manifest that this extraordinary tax could not be collected on the whisky as it comes from the still, or when it is first put in barrels, without hardship to the distiller or owner so great as to discourage its manufacture or confine such manufacture to persons or corporations of great wealth. It was necessary, or at least very desirable in the interest of the public revenue, that reasonable opportunity should be given to the distiller, to allow the product of his distillery to become marketable by the ripening process alluded to, before he was called upon to pay the tax * * *

* * * * *

..* * * the warehouse is theoretically in the joint custody of the store-keeper and proprietor, but, in fact, the control of the storekeeper is complete and practically exclusive. The lock is put on by the government and the key is in the store-keeper's possession * * *

* * * * *

..To all the world, but especially to those engaged in the business of distilling and of buying and selling whisky, it was apparent that the physical custody and control of the whisky here in question was not in the distiller and vendor, but in the revenue officers of the United States, and in neither case was the distiller capable of making physical delivery

¹⁰ Under a 1951 amendment to 26 USCA section 2800 (a) (1), the tax was \$10.50 on each proof gallon.

to his pledgee or vendee. All those doing business with these distillers, including creditors, were bound to take notice of this notorious physical fact and were put upon due inquiry, and had imposed upon them the duty of self-protection, as to the title of the goods so situated * * *

• • • • •

“The physical possession was not transferred, because it was out of the power of the vendor to transfer the same, without the payment of a tax many times the value of the goods sold, one of the very objects of the law providing for the government’s custody of the whisky presumably being that the payment of the tax might be deferred for a number of years without interfering with the right to transfer the property therein * * *

* * * * *

“As the reason for the rule making fraudulent, as against creditors, transfers of personal property, unaccompanied by actual delivery, is based upon the policy of preventing the fictitious credit permitted by allowing possession to remain in the debtor, it is pertinent to remark, in regard to a situation which, under the laws of the United States is, as we have said, *sui generis*, that, as the creditors of the Distilling Company had no access to the interior of the warehouse, they could not claim to have been misled to their injury. They cannot be deemed to have given credit upon the faith of whisky in a warehouse of which they had no means of ascertaining the contents.”

The Taney case, *supra*, was affirmed by the Supreme Court at 232 U.S. 174 (1914).

In an effort to distinguish the Taney decision on the facts, the Trustee and the Bank repeatedly point out that "other warehouses were so close to Hedge-side that whiskey and spirits could be stored elsewhere within 72 hours, so that tax payments could be avoided", while that was not true in Taney.

Precisely such an argument, however, was repudiated in the Supreme Court's Taney decision. Mr. Justice (later Chief Justice) Hughes said, at pages 185-186 of his opinion:

"It is said that the distiller need not use his own warehouse, but may place the goods in one of the general bonded warehouses established under the act of 1894 (28 Stat. at L. 564, 565, chap. 349). The appellee asserts that this would be impracticable; that no general bonded warehouse had been established in the collection district in question; that there are only twelve in the entire country, with a capacity that is extremely small in comparison with the output of the distilleries. But, aside from this, the distillery warehouse is equally recognized by law; it is a 'bonded warehouse of the United States'. If it is a fit place for storage, the distiller is not obliged to remove the spirits elsewhere * * *

"The fundamental objection is that the custom, to which the entire trade is adjusted, is opposed to public policy. But we know of no

ground for thus condemning honest transactions which grow out of the recognized necessities of a lawful business. The case is not one where credit may be assumed to be given upon the faith of the ostensible ownership of goods in the debtor's possession. Every one dealing with distillers is familiar with the established practice in accordance with which spirits are held in store, under governmental control, and are transferred by the delivery of such documents as we have here." (Emphasis supplied).

The Bank and the Trust insist that the Taney case can be distinguished on the ground that California law is different from Pennsylvania, and that the Supreme Court decided the case "under Pennsylvania law". In the excerpt just quoted, however, Mr. Justice Hughes was expounding, not state law, but a Federal statute relating to "a bonded warehouse of the United States".

Similarly, in *Marchants' National Bank of Baltimore vs. Roxbury Distilling Company*, DC Md., 196 F 76, 101 (1912), the Court discounted the effect of the local law upon the problem now being discussed:

"But independent of the special enactment of Maryland with regard to distillery warehouses, I am in full accord with the special master in his conclusion that, because of the peculiar situation of the distilled spirits stored in a bonded distillery warehouse, there is by the transfer effected by the warehouse certificate as full a delivery of the goods as is commercially possible

under the special circumstances attending distilled spirits stored in the bonded distillery warehouses of the United States.” (Emphasis supplied)¹¹

15. Conclusion

The Court holds that the 574 barrels of grain spirits purchased by Schenley and later pledged by Hedgeside to the Bank, belong to Schenley.

Schenley likewise has a superior title to the so-called “Heaven Hill whisky”, produced by Franciscan, sold by it to Barnhill, by Barnhill to Heaven Hill, and by Heaven Hill to Schenley. The last receipt for this whisky was issued to Barnhill more than four months before the first warehouse receipt for it was pledged to the Bank by Hedgeside, which at no time owned the merchandise in question.

The 900 barrels of grain spirits purchased by Schenley from Franciscan, first stored at No. 111 and later transferred in bond to No. 2, belong to Schenley for the reason that a transfer into bond constitutes a sufficient change of possession. Furthermore, the Bank has not shown that it was a creditor of Franciscan during the time that these 900 barrels remained in Franciscan’s warehouse, No. 111. Only

¹¹ See also *Bache v Hinde*, 6 Cir., 6 F 2d 508, 510, note 3 (1925), certiorari denied, 269 U. S. 581 (1925); *Brown v Cummins Dist. Corp.*, DC Ky., 53 F Supp 659, 664 (1944); *Wells Fargo Nev. Nat’l Bank of S. F. v Haslett Warehouse Company*, 60 Cal. App. 225, 228-229 (1922), petition for hearing in the State Supreme Court denied (1923); *Lederer v Railway Terminal & Warehouse Co.*, Ill., 178 N. E. 394, 396 (1931).

a creditor of Franciscan while the latter remained in possession could, under any theory, attack the sale to Schenley.

Nor will the Trustee be permitted to establish that, under the alter ego theory, he is in reality also a creditor of Franciscan as well as of Hedgeside. The "corporate veil" may not be pierced to work an injustice.

As the representative of Hedgeside—Schenley's bailee with regard to the 900 barrels of Mountain View grain spirits—the Trustee cannot question the title of his bailor, on the ground of the so-called delayed transfer from No. 111 to No. 2.

Furthermore, Schenley has established that it comes within the ambit of the California Warehouse Receipts Act, which our Court of Appeals repeatedly has declared has repealed Section 3440 "so far as the latter might otherwise apply to warehoused goods".

Apart from all this, however, because of the Government's tight control over distillers, storage of alcoholic products in an Internal Revenue Bonded Warehouse constitutes a sufficient change of possession under the California Bulk Sales Act.

Finally, Schenley or Schenley's predecessors in interest acquired a title to all of the 8,933 barrels of whisky and spirits that was prior in point of time to that of the Bank. In the absence of determinative considerations to the contrary, Schenley should not be deprived of the fruits of this priority. The Court does not find such countervailing elements present here.

Under all the facts, which are undisputed, and under all the legal principles applicable to those facts, to deprive Schenley of what, in good faith, it bought and paid for, would be "rigour and not law".

The Referee's Findings of Fact and Conclusions of Law, except as hereinbefore noted, and his Order are approved and affirmed.

Dated: August 18th, 1952.

/s/ DAL M. LEMMON,
United States District Judge.

[Endorsed]: Filed Aug. 18, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Charles W. Eb-
nother, the duly qualified and acting Trustee of the
estate of the above named bankrupt corporation,
one of the respondents to the Reclamation Petition
filed by Schenley Industries, Inc., a corporation, on
October 3, 1949 in the above proceeding for the
purpose of reclaiming certain properties inventoried
in the above bankrupt estate, hereby appeals to the
United States Court of Appeals for the Ninth Cir-
cuit, from the final order of the Honorable Dal M.
Lemmon, United States District Judge of the above
entitled court, signed and filed on August 18, 1952,
affirming the order of the Honorable Bernard J. Ab-
rott, Referee in Bankruptcy, signed and filed on

January 10, 1952, granting said Reclamation Petition.

Dated at San Francisco this 16th day of September, 1952.

/s/ FRANCIS P. WALSH,

/s/ HENRY GROSS,

/s/ JAMES M. CONNERS,

Attorneys for Charles W. Ebnother,
Trustee in Bankruptcy.

[Endorsed]: Filed Sept. 16, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Anglo California National Bank of San Francisco, a national banking association, one of the respondents to the Reclamation Petition filed by Schenley Industries, Inc., a corporation, on October 3, 1949 in the above proceeding for the purpose of reclaiming certain properties inventoried in the above bankruptcy estate, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the final order of the Honorable Dal M. Lemmon, United States District Judge of the above entitled court, signed and filed on August 18, 1952, affirming the order of the Honorable Bernard J. Abrott, Referee in Bankruptcy, signed and filed on January 10, 1952, granting said Reclamation Petition.

Dated at San Francisco this 16th day of September, 1952.

/s/ FREDERICK M. FISK,
/s/ CHICKERING & GREGORY,
Attorneys for Appellant Anglo California National
Bank of San Francisco.

[Endorsed]: Filed Sept. 16, 1952.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal herein as designated.

Reclamation petition filed by Schenley Industries.

Answer of Trustee to petition in reclamation.

Answer of Anglo California National Bank to petition in reclamation.

Order on reclamation petition.

Petition for review.

Referee's certificate on petition for review.

Supplement to Referee's certificate on petition for review.

Opinion and order of the District Court.

Notice of appeal of Trustee.

Notice of appeal of Anglo California National Bank.

Cost bond on appeal.

Designation of contents of record on appeal (Trustee).

Designation of contents of record on appeal (Anglo California Bank of San Francisco).

Order extending time to docket appeal.

Nine (9) volumes of Reporter's Transcript.

In Witness Whereof, I have hereunto set my hand and the seal of said Court, this 29th day of October 1952.

[Seal]

C. W. CALBREATH,
Clerk.

/s/ By C. C. EVENSEN,
Deputy Clerk.

In the Southern Division of the United States
District Court, for the Northern
District of California

In the Matter of

HEDGESIDE DISTILLERY CORPORATION, a
corporation,

Bankrupt.

TRANSCRIPT OF PROCEEDINGS ON
PETITION IN RECLAMATION
OF SCHENLEY

Oakland, Calif., October 18, 1949, 10:00 a.m.

Before Honorable Bernard J. Abrott, Referee in
Bankruptcy.

Appearances: Bronson, Bronson & McKinnon, by
Kirk La Shelle, Esq., and John Ward, Esq., Attor-
neys for Petitioner. Chickering & Gregory, Fred-
erick M. Fisk, by Frederick M. Fisk, Esq., and
Bruce M. Casey, Jr., Esq., Attorneys for The Anglo
California National Bank. Francis P. Walsh, Esq.,
Attorney for Trustee. [1*]

CHARLES W. EBNOTHER

called as a witness on behalf of the Petitioner, being
first duly sworn, testified as follows:

By Mr. La Shelle: I take it, Counsel, I can dis-
pense with the usual qualifying evidence as to Mr.
Ebnoter being the Trustee and so forth.

* Page numbering appearing at top of page of original Re-
porter's Transcript of Record.

(Testimony of Charles W. Ebnother.)

Mr. Fisk: That's agreeable.

Mr. Walsh: That's satisfactory. We stipulate.

Direct Examination

By Mr. La Shelle: Q. Mr. Ebnother, we served on you a short time ago a subpoena calling for certain documents. I take it that you have those documents with you. I am particularly interested—

A. Most of them; not all of them.

Q. I am particularly interested at the present time with Section 2 of the Subpoena, cancelled negotiable warehouse receipts—no, no, number 3, I made a mistake. The following non-negotiable warehouse receipts issued to Barnhill by Hedgeside covering the cancelled—on or about January 3rd. Have you those with you? A. I have.

Q. May we have them, please?

(Witness hands the documents to Counsel.)

Q. Now, you have got five warehouse receipt books here, one in your hand there. A. Yes.

Q. And I take it that in these five books, scattered throughout [19] apparently are the warehouse receipts in question? A. Yes.

Q. And they are in all five of them, are they?

A. (There was no answer.)

Q. They run through all five of them?

A. Yes.

Q. And—

A. All of the negotiable ones are in this book.

Mr. Walsh: What book are you talking about, Mr. Ebnother, for the record? Will you identify it?

(Testimony of Charles W. Ebnother.)

Mr. La Shelle: This book is labeled, Counsel, "Negotiable 351 to 400"; I take it that's the——

The Witness: That's the number of the receipts.

Mr. La Shelle: Q. Of the receipts?

A. That's right.

Q. These are all negotiable? A. Correct.

Q. And the other ones here bear the legend here, "Non-negotiables 3151 to 3200", so that they may be identified. Then there is this book, has the legend "Non-negotiables 3201 to 3250". Apparently, there are 50 receipts to a book.

Mr. Fisk: Could I have that last one? I didn't get it.

Mr. La Shelle: 3201 to 3250. Apparently, there are 50 receipts to a book. The next is labeled 3251 to 3300B, the letter "B" appearing after the number, non-negotiable. And the next is 3301 to 3350B, non-negotiable. In due course, Your Honor, we will want to introduce into evidence not all of these but some of them, but at the present time I want to have Mr. Johnson check certain numbers off of these to complete his work on the schedule, and if I can, I would like to hand them to Mr. Johnson. He will check them right here in the court room.

The Referee: You have no objection, Mr. Walsh?

Mr. Walsh: I have no objection.

The Referee: Mr. Fisk?

Mr. La Shelle: I am wondering if we should have these marked for identification in any way.

Mr. Fisk: I think that would be the best.

Mr. La Shelle: I think we should.

(Testimony of Charles W. Ebnother.)

Mr. Fisk: Just for the purpose of the record, the first two, or rather, the first book of non-negotiables that you read off, Mr. La Shelle, 3201 to 3250, you didn't say anything about a "B". I take it there should have been a "B" there, is that right?

Mr. La Shelle: No, I don't think so.

Mr. Fisk: Well, I don't know, myself. I just want to——

Mr. La Shelle: The first book is 3151 to 3200—no letters.

Mr. Walsh: Well, it will show on the warehouse receipt itself.

Mr. La Shelle: The next one is 3201 to 3250, no letters; the next one is 3251 to 3300, then there is a "B".

The Witness: That "B" is on all of them.

Mr. Walsh: I am sure it is on all of them. [21]

Mr. Fisk: The "B" is on all the non-negotiables, as I understand.

Mr. Walsh: Examine the receipts.

The Referee: All the non-negotiable warehouse receipts have a "B", and there are no letters on the negotiable receipts. You are offering these for identification at this time?

Mr. La Shelle: Identification only at this time, Your Honor.

Mr. Walsh: May I ask a question at this time? Are all these non-negotiable warehouse receipts, particularly the ones that were issued to Barnhill?

Mr. La Shelle: That's what we expect.

(Testimony of Charles W. Ebnother.)

The Referee: Is that correct, Mr. Ebnother?

Mr. Walsh: Wait a minute, Your Honor.

The Witness: I can't answer that, Sir.

The Referee: Well, who is going to testify now? If this is going to be testimony, we better have Counsel sworn in. The only man that I have sworn in—

The Witness: Your honor, they subpoenaed certain receipt numbers, and all I did was to look those numbers up and be sure they were in those books.

Mr. La Shelle: That's correct. That's all we ask for. In other words, we are just getting this for identification at this time, for our accountant to check.

The Referee: Mr. Walsh?

Mr. Walsh: Mr. La Shelle answered my question about [22] Barnhill.

Mr. La Shelle: I mean, I am not attempting to give evidence. It is so stipulated.

Mr. Walsh: The question recently asked in my opinion is incompetent at this time, because Mr. Ebnother is not competent to testify as to what is in the books.

The Referee: No, but my question was, after you had asked Counsel the fact.

Mr. Walsh: No, I am asking if he made that statement.

The Referee: Oh.

Mr. Fisk: One other thing that the record is

(Testimony of Charles W. Ebnother.)

not clear on, and that is, these are books of the Hedgeside Distillery Corporation.

The Witness: Yes. They were taken from the books and records of the Hedgeside Distillery Corporation.

The Referee: Negotiable Volume 351 to 400, Petitioner's No. 1 for Identification; 3151 to 3200 Non-negotiable, Petitioner's No. 2 for Identification; 3201 to 3250 Non-Negotiable, Petitioner's No. 3 for Identification; 3251 to 3300 Non-Negotiable, Petitioner's No. 4 for Identification; 3301 to 3350 Non-Negotiable (and all the Non-Negotiables have a "B" on them), Petitioner's No. 5 for Identification. [23]

* * * * *

OLIVER I. JACOBSON

called as a witness on behalf of the Petitioner, being first duly sworn, testified as follows:

The Referee: Your full name?

A. Oliver I. Jacobson.

Q. S-o-n, or s-e-n? A. S-o-n.

Direct Examination

Mr. La Shelle: Q. Mr. Jacobson, where do you live?

A. In Beverly Hills, California.

Q. And what is your business, Mr. Jacobson?

A. I'm a whisky broker and factor.

Q. And how many years, approximately, have you been engaged [61] in that business?

A. Since 1933.

(Testimony of Oliver I. Jacobson.)

Q. Since the repeal?

A. Since the repeal of the Eighteenth Amendment.

Q. And in the latter part of the year 1947 and the early part of 1948, were you doing business as an individual or partnership, or were you with a corporation? A. Corporation.

Q. And what was the name of that corporation?

A. Heaven Hill Corporation.

Q. And at that time, what was its place of business?

A. 650 South Spring Street, Los Angeles, California.

Q. And the Heaven Hill Corporation, I take it, had a Federal Basic Wholesaler's Permit?

A. We have Federal Basic Permits and Licenses from the State Board of Equalization, State of California, as manufacturers' agents.

Q. And sometime during the month of December, 1947, did you make a deal to purchase certain whisky from Barnhill Distillery Company?

A. Yes.

Q. And whom did you make that deal with?

A. With Mr. Mark Glaser.

Q. And that's Mark Glaser of Glaser Brothers?

A. Of Glaser Brothers, yes.

Q. And had you done business with them before?

A. I had been doing business with Glaser Brothers since 1934 or 1935. [62]

Q. And in the deal of this whisky, would you

(Testimony of Oliver I. Jacobson.)

just tell us how that deal was made? In other words, was it a formal written contract, or letter, or 'phone call, or what?

A. Mr. Mark Glaser let it be known that he had certain whisky for sale. I spoke with him on the telephone a number of times and I agreed to purchase that whisky from him.

Mr. Fisk: Well, I ask the last answer go out, as calling for his conclusion.

The Referee: So ordered.

Mr. La Shelle: Q. Well, state as near as you can recollect what the 'phone conversation was with Mr. Glaser, what you said, and what he said.

A. "What kind of whisky is it, how is it packaged? Where is it stored? What price do you want?" And I said, "Yes". And that was that.

Q. Now, I have here, and I'll show you, Mr. Jacobson, what purports to be an original invoice, number 439, to Heaven Hill Corporation from Barnhill Distillery Corporation, which you gave to me at my request, and that particular invoice you had where?

A. In the regular files in the office.

Q. Of the Heaven Hill Corporation?

A. Of the Heaven Hill Corporation.

Q. And you kept that as part of your permanent business records? A. Oh, sure.

Q. And you will notice there, under "Price", that it says, "90" on each item.

A. That's right. [63]

(Testimony of Oliver I. Jacobson.)

Q. And I take it that that means 90 cents per proof gallon.

A. That's right, original proof gallon.

Q. Original proof gallon?

A. Original proof gallon.

Q. And then, of course, these out here (indicating) are the extensions? A. That's right.

Q. And that was the purchase price.

A. That's right.

A. And I'll also show you what purports to be a draft, drawn on Heaven Hill Corporation to the Bank of America, payable to the American Trust Company, in the sum of \$131,983.70. Was that also in the business files of the Heaven Hill Corporation?

A. That's right.

Q. Which you gave to me at my request?

A. That's right.

Mr. Fisk: May I interrupt you, Counsel? Did you say Bank of America?

Mr. La Shelle: Yes, that's what it says.

Mr. Fisk: I beg your pardon.

Mr. La Shelle: To Bank of America, N. T. and S. A.

Mr. Fisk: That's right, I beg your pardon.

Mr. La Shelle: Q. And I take it that that cancelled draft was given to you in due course by the Bank after it had been paid?

A. That's right.

Q. Now, I also have—do you recall you first sent me this, saying that you found it in your files?

A. That's right.

(Testimony of Oliver I. Jacobson.)

Q. And then I 'phoned you to locate the original invoice and [64] cancelled drafts. And would you just run through this file and see if you recognize this as the file you first sent me?

Mr. Fisk: May I see the file?

Mr. La Shelle: Oh, I'm sorry. I might state, Mr. Fisk, that the photostatic copy that you were looking at a moment ago in that bunch there, those are photostatic copies of copies of this, not the original. They were taken from Barnhill's files.

Q. I'll also show you this file, which consists of various letters, documents, and one thing and another, and do you recognize that as the file which was sent me sometime ago? A. That's right.

Q. And this file, which the first thing on the top of the file (it's all clipped together) is the copy of the other invoice of Barnhill Distilleries Company?

A. Correct.

Q. And consists of various documents, all of which are clipped together; this, together with the draft I just mentioned and the original invoice, constitutes all of your original records that you kept in the course of business of Heaven Hill on this transaction? A. That's right.

Mr. Fisk: Your Honor, I haven't seen the document, but obviously those aren't records kept by them in the regular course of business. They are not original records. At the most, they purport to be copies of documents made by the Bank [65] of America and letters made by Heaven Hill.

(Testimony of Oliver I. Jacobson.)

Mr. La Shelle: They are records kept in the course of his business.

Mr. Fisk: You said, his original records kept in the regular course of business.

Mr. La Shelle: They are. They're the only records he's got. Here is the original invoice——

The Referee: Just a minute——

Mr. Fisk: The records are not kept by Heaven Hill, this witness, or his Company. They may have been received in the regular course of business, but they are not the records kept——

Mr. La Shelle: That's exactly the records received by them, and which constitute their file on this subject in the regular course of business, is that right?

Mr. Fisk: Q. Is that your testimony, Mr. Jacobson?

The Witness: I believe so, yes.

The Referee: Well, take a look at the document, and what is your testimony?

The Witness: All these papers that I am holding here were in our files, and we received them in the regular course of business, either from the respective banks involved or companies, and are copies of correspondence that we sent to Glaser Brothers.

Mr. Fisk: But Mr. Jacobson, are those all documents that you received, or are they just simply documents that you found [66] in the files of your Company upon receiving an inquiry from Mr. La Shelle?

A. These papers were in our files.

(Testimony of Oliver I. Jacobson.)

Q. And that's all you know about them? They were in your files. Is that correct?

A. Well, they've been there for a couple of years.

Q. Well, did you receive them? Did you receive those documents personally?

A. Our office did—stenographer.

Q. You didn't hear the question. I ask the last answer go out.

The Referee: So ordered.

Mr. Fisk: Q. Did you personally receive those documents? A. (There was no answer.)

Q. Well, isn't the obvious answer that you didn't, Mr. Jacobson? Isn't that your present recollection?

A. I didn't, personally—they weren't put in my hand, no, but these are in our files, the same as—there are tens of thousands of papers in our files that, if I were to refer to them and pick them up, I would say all these papers are relative to a purchase that I made from Mark Glaser and a sale made in turn to Schenley. And these papers are relative to that.

Mr. Fisk: And I ask that that answer go out.

The Referee: Yes, so ordered.

Mr. La Shelle: I submit that answer is a competent answer.

The Referee: It isn't up to this witness to decide [67] whether or not they are irrelative.

Mr. Fisk: Q. Are any of those documents addressed to you, Mr. Jacobson?

A. Not personally.

(Testimony of Oliver I. Jacobson.)

Q. What was your position with Heaven Hill in the fall of 1947?

A. I was President of the Company—President-Treasurer.

Q. During that period, were you in Los Angeles?

A. Yes, sir.

Q. Did you receive any correspondence from Barnhill or Mr. Mark Glaser in connection with this transaction? A. Personally?

Q. Yes. A. No.

Mr. Fisk: That's all, Your Honor. I submit that the witness got nothing but copies of the papers out of his file and sent them——

Mr. La Shelle: I haven't even offered them yet.

Mr. La Shelle: Q. Who is Mr. — I think his name is Harry Homel.

A. That's my associate, Vice President and Secretary of the Company at the time.

Q. By "Company", you mean Heaven Hill?

A. Heaven Hill Corporation, my associate.

The Referee: Mr. La Shelle, so the record will be clear on the subject, I think some of the documents should be identified. Otherwise, the record is just going to say this and that, and there is no indication whatsoever as to what we are talking about.

Mr. La Shelle: Well, at this time I offer in Evidence [68] the original invoice of Barnhill Distilleries Company Number 439.

The Referee: Petitioner's Exhibit Number 8 in Evidence.

(Testimony of Oliver I. Jacobson.)

Mr. La Shelle: And also the cancelled draft, which I have shown to Counsel here, dated January 5, 1948, drawn by Barnhill Distilleries Co. on the Heaven Hill Corporation to the Bank of America at Los Angeles, payable to the order of the American Trust Company of San Francisco, the amount being \$131,983.70.

The Referee: Petitioner's Exhibit Number 9 in Evidence.

Mr. La Shelle: Q. Now, Mr. Jacobson, this file here is a separate file, which is hard to identify, and supposing that we have the Judge write on the back, "Petitioner's Exhibit Number 10 for Identification," covering all the documents clipped together, so that we can have a record as to what we are talking about.

The Referee: Number 10 for Identification.

Mr. La Shelle: Q. Now, to make the record clear on Number 10 for Identification, this is what was in your files, whether you received it or made it, those were in your business files, which you kept in the ordinary course of business?

A. Yes sir.

Mr. Fisk: Q. At what time?

A. All the time. Since the transaction was made.

Q. Well, do you know that of your own personal knowledge?

A. Well, that's impossible. We have large files and many files. [69] I mean——

Q. Did you personally remove these from your files? A. Personally, myself.

(Testimony of Oliver I. Jacobson.)

Q. On what occasion?

A. On occasion of his request, of Mr. La Shelle's request.

Q. How long ago was that?

A. I believe last week, or the week before. Last week?

Mr. La Shelle: Well, in the last thirty days.

The Witness: In the last thirty days.

Mr. La Shelle: Counsel, I'm not particularly concerned about putting this in Evidence. I don't think it adds anything to the picture, in addition to the last two Exhibits that just went in, as far as proving our case is concerned. The only reason I have had it here is so that, if you wish, you may examine it, go through with it, ask him any questions you want about it. We are not hiding anything. This is the complete file.

Mr. Fisk: It's marked for Identification.

Mr. La Shelle: It is marked Number 10 for Identification. I am not concerned whether it goes in Evidence or not.

Q. Now, I take it that you are familiar with Mr. Homel's signature? A. Yes.

Q. I'll show you here, Mr. Jacobson, what purports to be invoice number 232A of the Heaven Hill Corporation, made out to Schenley Distillers Corporation, the unit price being \$1.02½ a gallon, and the extensions bring it out to a total [70] of, perforated there, \$150,314.77.

A. It's \$150,314.77, that's right.

Q. Is that one of your invoices?

(Testimony of Oliver I. Jacobson.)

A. Oh, yes.

Q. And I'll also show you here a cancelled draft, drawn by Heaven Hill Corporation on Schenley Distilleries Company, which I will call "Schenley's", and call to your attention the signature of what purports to be Harry L. Homel.

A. That is his signature.

Q. That's his signature. I ask that these two be marked for Identification only at this time, Your Honor.

Mr. Walsh: What is the date of that?

Mr. La Shelle: The date of the draft is January 5, 1948. I wonder if Your Honor, as these all came together, if you mark them, too, on the back for Identification.

The Referee: The draft and the invoice accompanying the draft, one Exhibit for Identification Number 11.

Mr. Fisk: What was the date of that invoice, Mr. La Shelle?

Mr. La Shelle: Date?

Mr. Fisk: On the invoice, yes.

The Referee: January 25, 1948, invoice number 232A.

Mr. La Shelle: Q. I'll also show you—you have seen these, haven't you, you know what these are—cancelled negotiable warehouse receipts?

Mr. Fisk: I don't know. I don't know as I have seen those particular ones. I would like to see them, if you [71] don't mind.

Mr. La Shelle: Q. Referring to Petitioner's

(Testimony of Oliver I. Jacobson.)

Exhibit Number 1 for Identification, which is a book of negotiable warehouse receipts of the Hedgeside, I'll show you what purports to be negotiable receipt number 384 of Hedgeside Distillery Corporation for whisky described on there, and note that one of the signatures has been torn off and on the reverse side you will find, in one spot here, the imprint of a rubber stamp of apparently Heaven Hill Corporation, "By", and then the signature of what purports to be one Harry L. Homel. Do you recognize that signature?

A. That's Mr. Homel's signature.

Q. I'll also show you number 385 negotiable warehouse receipt in this book, and on the reverse side again the stamp of Heaven Hill Corporation and the signature of Harry L. Homel. Do you recognize that signature as your associate's, Mr. Homel?

A. Yes, I do.

Q. And the same with reference to 386, again the signature of Harry L. Homel; do you recognize that signature as his?

A. Yes, I do.

Q. And the same as to warehouse receipt number 387, again Heaven Hill Corporation, Harry L. Homel?

A. Yes, I do.

Mr. La Shelle: I think that covers all of the ones, doesn't it? [92]

Mr. Ward: That's right.

Mr. La Shelle: Q. And is that Harry L. Homel, who was an officer?

A. Yes.

Q. What position did you say?

A. Vice President and Secretary.

(Testimony of Oliver I. Jacobson.)

Q. He was Vice President and Secretary, and you were President and Treasurer.

A. That is right.

Mr. Fisk: Q. Is Mr. Homel alive?

A. Oh, yes, he's alive, we're still associated.

Mr. La Shelle: I think that's all.

The Referee: Mr. Walsh?

Mr. Walsh: No questions at this time.

The Referee: Mr. Fisk?

Cross Examination

Mr. Fisk: Q. Mr. Jacobson, did you communicate with Mr. Mark Glaser first, or did he communicate with you first regarding this matter?

A. I don't remember that, as to whether I spoke with him first, or he spoke with me first. We had talks very, very often, because they were regular customers of mine, and——

Q. That is, Glaser Brothers were regular customers of yours? A. Yes.

Q. And you did quite a bit of business with them?

A. Oh, yes, various matters and various things all the time.

Q. Well, then, I assume that he communicated with you first, and advised you that he had this liquor—— [93]

A. That's right.

Q. ——on hand, is that right?

A. That's right.

(Testimony of Oliver I. Jacobson.)

Q. Did you do any business with Mr. R. I. Stone?

A. I did business with Mr. R. I. Stone when he was connected with Glaser Brothers.

Q. Well, Mr. Stone was formerly connected with Glaser Brothers?

A. Well, Stone was formerly a buyer for Glaser Brothers—liquor buyer.

Q. And you had considerable contact with him——

A. Yes.

Q. ——— in that connection? A. Yes.

Q. Did you ever have any contact with him, by way of doing business with Hedgeside?

A. I think so. I don't think I ever consummated a deal, I don't remember, but I don't think I ever consummated a deal with Mr. Stone or Hedgeside, but I think at various times through the years I might have contacted him via the telephone or by correspondence, asking a market price on his whisky or in connection with bottling or something; I mean, I'm in connection with practically every distillery where there's a possibility of my doing any business.

Q. Did you do any business with Mr. Stone by way of Franciscan? A. Oh, no, never.

Q. Never. A. Never.

Q. You never have done any business with Franciscan at all?

A. The name is unfamiliar to me. [94]

Q. How did you learn that Schenley was interested in this whisky?

(Testimony of Oliver I. Jacobson.)

A. It's our business to know—you see, I can explain possibly. The whisky business in bond, for example in the State of Kentucky, is a matter of record, and the ownership of the whisky in the distilleries, which distiller owns which whisky, is also a matter of record. A distillery continues to bottle in continuity. Now, if they run short of whisky, it's very apparent and obvious from the records that they're light certain inspection and brokers.

Mr. La Shelle: You might explain what inspection is.

The Witness: Inspection is the monthly whisky—the month and the day that the whisky is produced.

Mr. Fisk: Q. Well, do I understand your testimony to be that there are records kept in Kentucky of all the liquor owned by all distillers?

A. Oh, sure.

Q. All over the United States, the number of barrels?

A. That's true, the number of barrels of whisky in each distiller's warehouse in bond — United States Government bonded warehouse in the State of Kentucky.

Q. Now, does Kentucky keep a record of whisky in bond in the State of California?

A. No, just in Kentucky.

Q. Well, I am now asking you, how did you learn that Schenley was interested in this whisky?

A. We don't have to learn. If we have something, we offer it. [95] Sometimes, even without checking records, as to whether a man is short or

(Testimony of Oliver I. Jacobson.)

not, we offer it and broadcast it. Some brokers send out postcards, some brokers send out files, letters, use the long-distance telephone. We're a very small group comparatively.

Q. In this particular instance, what means did you use to get into contact with Schenley with regard to the sale of this whisky.

A. I 'phoned them.

Q. You telephoned? A. That's right.

Q. Whom did you telephone?

A. I telephoned the chairman of the Board, Mr. Louis Rosenstiel.

Q. And what did you advise him?

A. That I had so many barrels of whisky to sell, would he be interested.

Q. Can you fix the approximate date of that telephone conversation?

A. I know it was in December of 1947, to the best of my recollection. Schenley Distillers buy from every broker and from many sources all the time.

Q. Are you certain in this instance that you went to Schenley, or that Schenley came to you?

A. I went to Schenley.

Q. You are positive of that?

A. I am positive of that.

Q. You are certain that you didn't go through some other broker?

A. That could have been. That's quite [96] possible—quite possible.

Q. Are you certain that a broker from Schen-

(Testimony of Oliver I. Jacobson.)

ley's—a broker representing Schenley's didn't come to you?

A. A broker representing Schenley. I don't remember, but that's also possible. Many things can enter into a transaction. We try to consummate a sale any way that we can.

Q. When Heaven Hill bought this whisky from Barnhill, you, of course, knew where the whisky was produced, did you not? A. Oh, yes.

Q. Do you recall now where it was produced?

A. I want to correct myself there. It comes back to me now. I have the impression that the whisky was produced by Hedgeside Distillery, and when it was sold to me it was represented as Hedgeside whisky, in Napa, California. When the invoice came in, I noted "Mountain View Distilling Company". I am now talking from memory, and I can't be absolutely exact. I believe at that time I 'phoned Mark Glaser, and I believe he said to me it was a tenant operation or a d.b.a. I said, "Was it made at the Hedgeside plant at Napa?" I believe he said, "Yes". I says, "Is the whisky all right?" "Yes. Okay".

Q. What is a d.b.a.?

A. "Doing business as". A distiller can use a trade name.

Q. In other words, Mark Glaser told you that Hedgeside was doing business as Mountain View?

A. Not in those words. I don't know the word that he employed. [97]

Q. But that was the substance of it?

A. You see, there are innumerable d.b.a.'s and

(Testimony of Oliver I. Jacobson.)

tenant's distillery operations at various distilleries that the Alcohol Tax Unit permits, and you may make whisky under ten different names or a hundred different names at one distillery. But in the brokerage world, if that whisky was produced at a specific distillery, regardless of the name under which it was produced, the custom is significant. It's accepted as that distiller's whisky.

Q. But as I understand your testimony collectively, under various statements you have made here this morning, you knew nothing of Franciscan or Mountain View. You did know of Hedgeside?

A. That's right.

Q. You did know Mr. Stone and the tenor of your conversation with Mr. Mark Glaser was that this whisky—you asked him if it was Hedgeside, and he said, "No", but it was all right, that it was probably a d.b.a., or something—

A. Words to that effect, yes.

Q. That's right. Heaven Hill, I know, paid ninety cents a proof gallon. Who determined that figure?

A. It was offered at that price. The seller.

Q. You received an offer from Mark Glaser at ninety cents a proof gallon, is that right?

A. That's right.

Q. And that figure was acceptable to you?

(The witness nods affirmatively.)

Q. And you bought it on that basis?

A. That's right. [98]

Q. I note that, from the draft, you sold it—

(Testimony of Oliver I. Jacobson.)

Heaven Hill sold it to Schenley for \$1.02 per proof gallon.

A. \$1.02½.

Q. \$1.02½. Who determined that figure?

A. I did.

Q. You offered it to Schenley at that figure?

A. I think I offered it for more than that. We finally compromised at \$1.02½. That's all he would pay.

Q. That is Mr. Rosenstern?

A. Rosenstiel.

Q. Rosenstiel.

A. The market was very strong at the time.

Q. In connection with this sale, did you have any correspondence, or Heaven Hill or Mr. Homel or anybody connected with Heaven Hill have any correspondence, with Schenley?

A. (Nods negatively) I don't remember that.

Q. You can't say whether you did or not?

A. No, but I don't think so. I just spoke to Mr. Rosenstiel. It was a deal.

Q. Now, will you have your records checked and determine whether or not there was any correspondence between Heaven Hill and Schenley on this transaction? Will you do that?

A. I will.

Mr. La Shelle: If I might interrupt there—this is all that he could find.

Mr. Fisk: The witness has said he will make an investigation, and I request that he do so. [99]

Mr. La Shelle: Well, I am not going to bring

(Testimony of Oliver I. Jacobson.)

this witness back from Los Angeles, I'll tell you that.

Mr. Fisk: Well, we will keep him here until we get it, then.

Q. Now, Mr. Jacobson—

A. May I add something, please?

Q. No, you answer my questions. If you want to explain your answer, why—

A. No, I mean pertinent to the thing that we were talking about that you asked me before.

Q. About correspondence—have you any correspondence? A. Yes.

Q. Yes.

A. When I said—Mr. La Shelle, I asked the girl to get me the file on this matter. She brought me the file, and that primarily is the entire file, everything that was in the files. I sent it to Mr. La Shelle, everything.

Q. Practically?

A. Well, I mean I can't be sure. We have large files. That was the entire file.

Q. Well, from your examination, is it your statement under oath that there was no correspondence on this transaction between Heaven Hill and Schenley?

A. Between Heaven Hill and Schenley on this transaction?

Q. Yes sir, other than what is produced here in the court room here this morning?

A. Oh, I can't say that. I can't remember well enough. [100]

(Testimony of Oliver I. Jacobson.)

Q. Then you will make a check and find out, if there is? A. I will definitely make a check.

Q. Did you have any conversations or correspondence with Mr. Mark Glaser or Glaser Brothers or Barnhill, concerning this transaction?

A. I don't remember that, either.

Q. Would you check on that?

A. I'll check on that.

Q. Did you have any communications with Mr. Mark Glaser regarding the price you were to charge Schenley? A. No.

Q. That was a matter entirely within the control—

A. That was my job.

Q. Of Heaven Hill? A. That's right.

Q. And you had nothing to do with the price that was set by Mr. Mark Glaser, excepting that you accepted it?

(Witness nods affirmatively.)

Q. His offer, is that correct?

A. That's right.

Q. Did you know that at this time Schenley had a production agreement with Franciscan to take all of its production? A. I did not.

Q. You did not?

A. I never knew it at any time.

Mr. Fisk: If Your Honor please, that is all at this time, but I would like to keep the matter open and have the [101] witness make the check, and I am perfectly willing that he send it up to Mr. La Shelle, and Mr. La Shelle advise me.

(Testimony of Oliver I. Jacobson.)

The Referee: Mr. Jacobson, you understand that?

The Witness: Yes, I do.

The Referee: Mr. Fisk's suggestion, rather than keep you here or make you return, you will instruct your office, or you, yourself, will send any communication, correspondence, anything that you have on this matter, to Mr. La Shelle?

The Witness: That I had in relation to it, any correspondence that I might have had with the Schenley—

The Referee: Any correspondence that you had with reference to your purchase of this whisky, number one; and number two, the sale of it.

The Witness: Right.

Mr. Fisk: And in that connection, if the Court please, depending on what develops, I would like to reserve my right to have a further cross examination of this witness, if I see fit. I will take the necessary steps to do it by way of deposition or something of that type, but I don't want to foreclose any right for further cross examination if I see fit to have any.

The Referee: That's right. That's understood by the Court, and it is so ordered. In the event that you desire to bring him back, it will be at your expense. In the event that you desire to take his deposition, you will make the arrangements. Mr. La Shelle, you understand that; no objection? [102]

Mr. Fisk: You are agreeable to it, are you, Mr. La Shelle?

(Testimony of Oliver I. Jacobson.)

Mr. La Shelle: I have no objections.

The Referee: Anything further, Mr. Walsh?

Mr. Walsh: No questions.

Mr. La Shelle: I have just one or two questions I would like to ask.

Redirect Examination

Mr. La Shelle: **Q.** You will recall, Mr. Jacobson, when you sent me first the Exhibit Number 10, the copy of the file, which apparently the girl wrote you and I 'phoned you, insisting there must be a cancelled draft, original invoice; and did you look for everything, or did you personally make that search? **A.** Personally.

Q. Did you find anything else at that time other than the cancelled drafts and the original invoice?

A. No.

Q. And with reference to your testimony, as whisky broker when you buy from "A" and sell to "B", and so forth, customarily in your business do you have formal contracts or letter contracts covering that, or do you handle it by the 'phone and discussions or what would you; just explain that to the Court.

A. We are a very small group in the brokerage business. We don't have six, maybe eight, in the United States, whisky brokers or factors. We're in constant communication with one another. If we have something to sell, we get on the [103] telephone, because the market fluctuates. The market's very fast, it's up and down daily, so naturally we

(Testimony of Oliver I. Jacobson.)

can't wait to use the mails. We call on the telephone; that's part of our expense and our business. We offer it. We buy or we sell. It may involve a million dollars, Your Honor, but if we say we bought it, we bought it; and if the other party says he sold it, he sold it. No confirmation may ever pass, excepting that telephone conversation, until one secures his invoice or drafts, the invoice accompanying the draft with the warehouse receipts attached. And that's all that ever happens, and there have been hundreds of millions sold throughout the year in that manner. One default, and you're out of business.

The Referee: Q. Did you people actually take possession of the whisky that we're talking about here?

A. Sometimes we do, sometimes we don't.

Q. No; I say, the whisky we're talking about. Did you actually take possession of it?

A. No, we never take possession. It's all handled in negotiable warehouse receipts.

Q. How long would you say lapsed between the time you purchased and the time you sold it to Schenley; how long were you holding it?

A. Your Honor, I don't remember, but I would say in the ordinary course of business, before the warehouse receipts and the invoice are made, from a week to three weeks elapse.

Mr. Fisk: Your Honor, I ask that that go out.

The Referee: I said, in this particular instance.

(Testimony of Oliver I. Jacobson.)

The Witness: Perhaps two to three weeks, I can't remember.

The Referee: Q. You don't know?

A. It's impossible.

The Referee: Very well.

Mr. Fisk: Q. Did you pay Schenley, or did Schenley pay you before you paid Barnhill?

A. Would you repeat that, please?

(The last question was read by the reporter.)

A. Oh, Schenley never would pay for anything, unless they get the warehouse receipts and examine it.

Q. I still ask you, did you receive your money from Schenley before you paid Barnhill?

A. I did not.

Q. You did not.

A. Wait a minute, I take that back. I received—the draft was paid by Schenley before I paid Barnhill. That's quite right. It involved a lot of money, and that's right.

Q. And——

A. We had the privilege of redrafting.

Q. You never saw this whisky at all?

A. No.

Q. You just had in your hands, I take it, or your Company did, warehouse receipts of Hedgeside, is that correct?

A. Yes. All whisky is handled that way. It's in United States Government Bond, it's got to be tax paid.

(Testimony of Oliver I. Jacobson.)

Mr. Fisk: I ask the answer go out as not responsive. [105]

The Referee: So ordered.

Mr. Fisk: Q. All you had in connection with the whisky itself in this transaction was the warehouse receipts of Hedgeside, is that right?

A. That's right.

Mr. Fisk: That's all.

Mr. La Shelle: Just one moment.

Q. What do you mean. You mention you had the privilege of redrafting. What do you mean by that?

A. Well, if it involved a lot of money, we buy it from the source. They always send a sight draft, naturally, with invoice attached, and warehouse receipts. We ask for the privilege of taking out those warehouse receipts on trust receipts and redrafting. We may not have enough money in the bank at the time, and send a redraft. When the draft is paid, that portion which belongs to the seller is transferred on by the bank to the seller; that's customary in our business and quite regular.

Q. And the balance goes——

A. That's right.

Mr. Fisk: Q. Mr. Jacobson, did you buy this whisky from Barnhill as the principal, or did you handle the transaction as a broker?

A. It's understood that I'm a broker.

Q. Well, in this——

The Referee: Wait a minute, Mr. Fisk.

Q. Regardless of whether it being understood

(Testimony of Oliver I. Jacobson.)

that you're a broker or not, what is your answer to Mr. Fisk's question? [106] Did you handle this transaction as a broker—

Mr. Fisk: Q. Or did Heaven Hill buy it as principal?

A. May I say something, Your Honor?

The Referee: Surely.

The Witness: It's difficult. There's a line of demarcation there which isn't understood by people outside of our business. Brokers ordinarily have a commission man, but a broker in the whisky business is not a commission man. He is actually a factor. He may make an arrangement on a straight commission basis, or he may buy and sell but still as a broker.

The Referee: Q. Well, let me ask you this: Before you actually consummated the deal with Mark Glaser, did you already have a purchaser for this whisky?

A. No, I had no purchaser at that time.

Mr. Fisk: Q. Did you have a commitment?

A. I had no commitment in advance.

Q. You are sure of that?

A. From Schenley, is that the question?

Q. From anybody.

A. To sell—to sell the whisky?

Q. That's right.

A. I had no commitment in advance. I am sure of that.

Q. From anybody? A. From anybody.

Q. You take the warehouse receipts of Hedge-

(Testimony of Oliver I. Jacobson.)

side, 384, 5, 6, and 7. Did you actually receive those warehouse receipts, [107] or did they go directly from Barnhill to Schenley?

A. Personally, I never saw a Hedgeside Warehouse receipt in my life. I don't handle the details or the mechanics of a transaction.

Q. Do you know whether or not Glaser Brothers acted as a broker or the principal in this transaction?

Mr. La Shelle: We object to the form of that question, Your Honor, as calling for the conclusion and opinion of the witness.

The Referee: He asked him if he knew.

Mr. Fisk: He's been telling us quite a bit about it, the difference between a whisky broker and factor.

The Referee: You can answer that. Did you know whether they were——

A. I was in no position to know, Your Honor.

The Referee: Very well.

Mr. Fisk: Q. You didn't know

A. I was in no position to know.

Q. Well, did you know?

A. At the time, I was in no position.

Q. Well, do you know now?

Mr. La Shelle: I make the same objection to that, as incompetent, irrelevant and immaterial.

The Referee: Q. Did you know at the time?

(Witness nods negatively.)

Mr. La Shelle: Don't shake your head. [108]

(Testimony of Oliver I. Jacobson.)

The Witness: I mean, did I know at the time. I did not know at the time, Your Honor.

Mr. Fisk: Q. Do you know now?

A. I do not know now.

Q. Does it make any difference as to what commission you can charge, whether you buy and sell as principal or as broker? A. No sir.

Q. It does not, because there are no limitations on the commissions that a whisky broker may charge? A. No sir.

Q. Did the Heaven Hill Company in connection with this transaction receive any non-negotiable warehouse receipts of Hedgeside?

A. Yes, they sent us non-negotiable warehouse receipts, and Mr. Homel sent them back and demanded negotiable warehouse receipts, because we don't handle anything but—they have got to be strict negotiables, or we don't handle it.

Q. Do you recall the number of non-negotiable warehouse receipts that were sent to you?

A. No sir, I don't.

Q. I believe you testified that you have never seen a Hedgeside warehouse receipt.

A. That's right.

Mr. La Shelle: The record might show that the information upon which Counsel is cross-examining is from Petitioner's Exhibit No. 10 for Identification.

Mr. Fisk: Q. Well, as I understand your testimony, you [109] can't personally say whether or

(Testimony of Oliver I. Jacobson.)

not any warehouse receipts, negotiable or non-negotiable, were ever received by Heaven Hill.

A. Oh yes, my instructions are to my office not to accept anything but strictly negotiable warehouse receipts properly endorsed.

The Referee: Just a minute, Mr. Fisk. Will you read Mr. Fisk's question and the witness's answer?

(The last question and answer were read by the reporter.)

Mr. Fisk: And I ask that answer go out as not responsive.

The Referee: So ordered.

Mr. Fisk: Q. Do you understand the question? You have no personal knowledge of whether or not any receipts at all—any warehouse receipts at all, were ever received?

A. Excepting this, if you please.

Q. Well, will you answer my question, "Yes" or "No", and then explain it?

A. Well, I can't.

Q. Answer "Yes" or "No", and then explain it.

A. Personally, no. Now, you let me answer.

Q. Now give your explanation.

A. I mean, the explanation. I couldn't sell it, nor would it be acceptable to Schenley, unless it were negotiable.

Mr. Fisk: Well, that is a conclusion of the witness, and I ask that it go out, Your Honor.

The Referee: So ordered. The witness has already [110] testified that he has never seen a Hedge-side Warehouse receipt; is that correct?

(Testimony of Oliver I. Jacobson.)

A. That's right, Sir.

Mr. Fisk: As I understand the record, the only testimony that this witness has given with respect to these warehouse receipts is that he recognizes the signature of Harry L. Homel as being the signature of his partner. That's the extent of his knowledge on these warehouse receipts, is that not true?

The Witness: That is right.

Mr. La Shelle: That's all I have attempted to show.

Cross Examination

Mr. Walsh: Q. Mr. Jacobson, one or two questions on Petitioner's Exhibit No. 10 for Identification, that is your office file. Now, I would like to have you examine this again, particularly the letter—carbon copy of the letter.

Mr. La Shelle: Do you want the original?

Mr. Walsh: Just a minute. We heeded to you. Now let me cross-examine the witness. I want to show that he doesn't know anything about it.

The Referee: Mr. Walsh, for the record, will you please tell the court reporter the date of that letter you are asking about?

Mr. Walsh: Yes, carbon copy of the letter dated December 30, 1947.

Q. Now, Mr. Jacobson, I understood from your testimony of the direct examination that this is a carbon copy of a letter [111] which you had in your files. A. Apparently.

Q. Now, Mr. Jacobson, examine it. I don't think you understand some of the testimony you gave.

(Testimony of Oliver I. Jacobson.)

A. Well, this is a copy of the letter that Mr. Homel, my associate sent to Glaser Brothers.

Q. Will you examine the pencil writing on this carbon copy?

A. The attached list was copied from one which we received from Glaser Brothers, but which was returned with the non-negotiable warehouse receipts for their records.

Q. Now, whose writing is that?

A. I don't know, maybe the girl in the office.

Q. Would you know whose writing it is, Mr. Jacobson?

A. No sir, I don't. Now, here is the list he is referring to.

Q. Do you know that this is a copy of the original list that is in your office?

A. This is what Glaser Brothers sent us.

Q. Will you read the witness the question, Miss Reporter, please?

(The last question was read by the reporter.)

Mr. Walsh: Q. Do you know if this is a copy of the original list in your office? Just answer my question "Yes" or "No".

A. Read it again, please.

(The last question was read by the reporter.)

A. You want a "Yes" or "No" answer? [112]

Q. Yes. A. No.

Q. You do not know? A. No.

Q. Now, Mr. Jacobson, you made the statement that you are a broker and a factor. When you make the statement that you are a broker, do you use that

(Testimony of Oliver I. Jacobson.)

in the general term, or the general meaning of the term, factor? A. Yes.

Q. And what is the general meaning of the term, factor, in the merchandising business?

A. All right. If you, as a manufacturer, were to approach me to tell me that you would sell me something that I wanted, that you were making at a specific price, but you wanted me in advance in order to make it I would make partial payment in advance against that product, so I could secure it at an advantageous price and resell. In other words, I will buy in advance of production.

Q. In other words, the term factor implies the procedure of financing to a certain extent?

A. That's right.

Mr. Walsh: That's all I want to know.

The Witness: That's right. That's my impression and understanding of the word, factor, as I use it.

Mr. Walsh: Q. Was there any financing in this transaction? A. None.

Q. None required. Do you know if Heaven Hill transferred any warehouse receipts to Schenley's when this transaction [113] was consummated?

A. I don't understand the question.

Mr. Walsh: Read the question, Miss Reporter, please.

(The last question was read by the reporter.)

A. Our office endorsed these warehouse receipts, and that was a transfer to Schenley, yes.

Q. Did you endorse them, yourself?

(Testimony of Oliver I. Jacobson.)

A. No, Mr. Homel did.

Q. Now, I want you to examine these warehouse receipts, 384, 385, 386, and 387—of course, you can't, because you testified you have never seen those.

A. To the best of my knowledge I have never seen them.

Q. Well, you can't tell us whether or not these warehouse receipts were ever in the possession of Heaven Hill? A. They must have been.

Q. How do you know that?

A. That's right.

Mr. La Shelle: I submit that this is not proper cross examination. The man has emphatically stated five times he has never seen, of his own personal knowledge. That's the end of it, and I think we are taking up a lot of useless time.

The Referee: For the information of Counsel, I will go further than that. Reading the Trustee's Answer, he admits that the warehouse receipts were in existence.

Mr. La Shelle: That's true, that is true, Your Honor, and I don't see any purpose of this, other than just take time [114] and delay the proceedings.

(Discussion off the record.)

The Referee: Anything further, gentlemen, of Mr. Jacobson?

Mr. La Shelle: One more question.

Q. Just to identify this, I'll show you the original or what purports to be the original of a letter Mr. Walsh showed you written by Heaven Hill Corporation to Glaser Brothers, and on the second

(Testimony of Oliver I. Jacobson.)

page ask you if you can identify the signature of Mr. Homel there?

A. That is the signature of my associate.

Q. That's his signature, and that's the letterhead that you were using at that time?

A. That's right.

Mr. La Shelle: We offer that as Petitioner's Exhibit for Identification next in number, Your Honor.

Mr. Walsh: Let the record show that this was just handed to Mr. La Shelle in court by Mr. Jaffa, attorney for Glaser Brothers.

Mr. La Shelle: Where else do you think I would get it?

(Discussion off the record.)

The Referee: The letter dated December 30th, 1947, on the letterhead of Heaven Hill Corporation, signed with the signature, "Harry L. Homel, Vice President, Heaven Hill Corporation", will be Petitioner's Exhibit Number 12 for Identification. Very well, Mr. La Shelle, you may proceed. [115]

Mr. La Shelle: One more question.

Q. When you buy, say you bought this lot of whisky (as I understand it, I'm not sure), you buy on your own account and try to sell for more?

A. That's right.

Q. As the market goes down, you lose?

A. Yes, and that's frequent.

Q. As it goes up, you win?

A. That's right.

Q. Something like the stock market?

(Testimony of Oliver I. Jacobson.)

A. Exactly.

(Discussion off the record.)

Mr. La Shelle: All right. I think that's all, Mr. Jacobson.

The Referee: Mr. Jacobson, you are excused, with the previous admonition.

* * * * * [116]

ROBERT H. BAGLIN

called as a witness on behalf of the Petitioner, being first duly sworn by the Referee, testified as follows:

The Referee: Your full name?

A. Robert H. Baglin, B-a-g-l-i-n.

Q. Robert Baglin, and where do you reside, Mr. Baglin? A. San Carlos.

Q. Do you have a route number?

A. 166 Alberta Avenue.

Q. San Carlos. Very well, Mr. La Shelle.

Direct Examination

Mr. La Shelle: Q. Mr. Baglin, what is your capacity with Schenley Industries?

A. San Francisco plant manager.

Q. And approximately how many years have you been in that capacity? A. Five years.

Q. And were you with the Company before that?

A. I was.

Q. Climbed up the ladder, I take it?

A. Yes.

Q. With reference to the reduction from Franciscan and Hedgeside of spirits that we have been

(Testimony of Robert H. Baglin.)

talking about here, would you just explain to the Court generally how you handled that, with reference to the approval of the spirits, how the invoices and warehouse receipts came in, and generally how it was wone?

Mr. Fisk: You have reference to what particular spirits? Just any spirits? During this period?

Mr. La Shelle: Yes, everything except the stored Heaven Hill stuff; he had nothing to do with that.

Mr. Fisk: Nothing to do with whisky?

Mr. La Shelle: Well, I think there might be a few barrels of whisky in the lot, outside of Heaven Hill; was there?

The Witness: Yes, there was.

Mr. La Shelle: Q. But it was mostly the grain spirits—I might refer to the Schedule here. If you will look at the “C”, the one I gave you with the letter “C” on it, it would cover the first part of the page, where it says, “Spirits produced or purchased under the terms of the contract dated November 1, 1945”; the spirits and whisky purchased from Hedgeside under contract dated October 13, 1947. Then, the next one, spirits produced and purchased under the terms of the contract dated October 13, 1947. It would cover all of the second page, with the exception of purchase of whisky by Schenley Distillers Corporation and Heaven Hill Corporation. It does not cover that. He had nothing to do with that. And it would cover the next page, and it would cover the last page. In other words, it would cover everything except the 2,859 barrels which we have

(Testimony of Robert H. Baglin.)

designated informally as the Heaven Hill purchase, to distinguish it from the others.

I might, to speed things up a little bit, as I understand it, the first part of some of those spirits was first handled direct with the New York office of Schenley's. A. That is right.

Q. And then, that method was changed and it was handled [187] out here? A. That's right.

Q. And that's more or less when you stepped into the picture? A. That's right.

Q. Now, with reference to that phase of the case—you might tell us this first: Did Schenley have one of its employees up in the plant, inspecting the whisky or spirits as it was produced?

A. We did.

The Referee: What plant, Mr. La Shelle?

Mr. La Shelle: Pardon me?

The Referee: What plant?

Mr. La Shelle: I mean the Hedgeside and Franciscan.

The Referee: You meant what?

Mr. La Shelle: Hedgeside and Franciscan.

Q. In other words, Schenley had one of its employees at Napa, inspecting the batches of spirits and/or whisky as it was produced?

A. That is right.

Q. And what was his name?

A. Mr. Walter del Tredici.

Q. The spelling of that Tredici?

A. T-r-e-d-i-c-i. I think it's Walter del Tredici.

(Testimony of Robert H. Baglin.)

It's really an odd name. I'm not absolutely sure of that spelling.

Q. Starting from there, will you tell us approximately how that was handled; I mean, what was done, and how was it handled, in a general way.

A. Well, under the contract, we were paying for the spirits [188] and/or whisky under two prices.

The Referee: Under what contract?

A. Under the contract of October 13, 1947.

Mr. Fisk: Your Honor, I am going to make an objection to this——

Mr. La Shelle: Here, we have it here.

Mr. Fisk (continuing): ——to this form of examination.

The Referee: Sustained.

Mr. Fisk: I think he should ask him question-and-answer form.

The Referee: The objection is sustained.

Mr. La Shelle: I am trying to speed this up. I have all of these, and suggest we mark them for Identification now. There are photostats behind all of these. That's why they're clipped together, and I have got this for ease of handling. H-1 means Hedgeside, and that's the first contract. That's the date of the contract.

(Discussion off the record.)

Mr. La Shelle: Do you want to mark it for Identification in the righthand corner? There are quite a few of them. Some of them probably don't mean much, because they were obsolete at the time.

The Referee: A document addressed to Schenley

(Testimony of Robert H. Baglin.)

Distillers Corporation, dated September 13, 1945, and signed by Hedgeside Distillery Corporation by R. I. Stone, President, with a memorandum attached, with the red letters H-1, 9-1-45, [189] will be marked Petitioner's Number 14 for Identification.

Mr. Fisk: Would the Court state on whose behalf Stone purports to sign, or is it just signed "Stone"?

The Referee: It's signed "Hedgeside Distillery Corporation, by R. I. Stone, president." A document——

(Discussion off the record.)

The Referee: Let the record show that the memo referred by the Court is merely a yellow slip of paper, with the red pencil notation, "For convenience", placed on there by whom, Mr. La Shelle?

Mr. La Shelle: By myself, in my handwriting, and not considered part of the evidence. It's just simply a——

The Referee: The next document is addressed to the Hedgeside Distillery Corporation, Napa, California, and it's signed "Schenley Distillers Corporation, by——

Mr. La Shelle: Seskis, S-e-s-k-i-s.

The Referee: His initials?

Mr. La Shelle: Well, I think it's "J", I'm not sure.

The Referee: Mr. Baglin?

The Witness: I am not conversant with his signature, but it is J. Seskis.

(Testimony of Robert H. Baglin.)

The Referee: And the hand signature is J. Seskis, Vice President; and also on the document, dated the 7th day of September, 1945, "Accepted and agreed to, Hedgeside Distillery Corporation, by R. I. Stone, President."

Mr. La Shelle: I think that's dated the 17th.

The Referee: Did I say the 17th?

Mr. Fisk: You said the 7th.

The Referee: The 17th, pardon me, you're correct, Mr. La Shelle. 17th day of September, 1945, and that will be marked Number 15 for Identification. And it also has the memo heretofore referred to, H-2-9-17-45.

The next document—

Mr. La Shelle: I am also showing Counsel—I'll show them photostatic copies of this.

The Referee: The next document is on a letterhead, "Schenley Distillers Corporation, Empire State Building, 350 Fifth Avenue, New York City", dated September 17, 1945, addressed to Hedgeside Distillery Corporation, Napa, California; it is signed, "Very truly yours, Schenley Distillers Corporation, by—", and the same gentleman, "J. Seskis, President;" and over on the lefthand side, "Accepted and agreed to; Hedgeside Distillery Corporation, by R. I. Stone"; and what appears to be in pen and ink, "P-r-e-s." Although the Court is not testifying, that is what it appears to be, and that will be marked Petitioner's Number 16.

Mr. Fisk: For Identification.

(Testimony of Robert H. Baglin.)

The Referee: For identification. And Petitioner's Exhibit Number 16 has the memo, H-3-9-17-45.

The next document is on a letterhead, "Schenley Distillers Corporation, 582 Market Street, San Francisco 4, California", dated November 1, 1945, addressed to Hedgeside [191] Distillery Corporation, Napa, California, signed, "Very truly yours, Schenley Distillers Corporation, by—", it looks like "J. A. Woolsey".

Mr. La Shelle: J. E. Woolsey. I know that signature.

Mr. Walsh: J. what?

The Referee: James E. Woolsey, W-o-o-l-s-e-y, "Assistant Secretary, Accepted and agreed to, Hedgeside Distillery Corporation, by R. I. Stone", and also what appears to be P-r-e-s period. And there is also the memo, H-4-11-1-45. Petitioner's Exhibit Number 17 for Identification.

The next document is on a letterhead, entitled, "Schenley Distillers Corporation, 582 Market Street, San Francisco 4, California," dated December 21, 1945, addressed to "Hedgeside Distillery Corporation, P. O. Box 269, Napa, California, Attention R. I. Stone, President." The document is signed, "Schenley Distillers Corporation, by——"

Mr. La Shelle: M. J. Nauheim. I know that signature.

The Referee: Vice President, and the notation, "Accepted and agreed to, Hedgeside Distillery Corporation, by R. I. Stone," and on this document the typewritten notation, "President". And there is at-

(Testimony of Robert H. Baglin.)

tached to that, "H-5-12-21-45". Will be marked Petitioner's Exhibit Number 18 for Identification.

The next document is on the letterhead, "Schenley Distillers Corporation, 582 Market Street, San Francisco 4, California". The document is dated February 14, 1946, addressed to "Hedgeside Distillery Corporation, Napa, California", [192] signed, "Schenley Distillers Corporation, by M. J. Nauheim", signed and typewritten, "Vice President". "Accepted and agreed to, Hedgeside Distillery Corporation, by R. I. Stone", and then, typed in, is, "R. I. Stone, President"; and the memo attached, "H-6-2-14-46". Will be marked Petitioner's Number 19 for Identification.

The next document has a pen notation at the top, "Duplicate Original"; typewritten, "Agreement entered into this 30th day of April, 1947, between Schenley Distillers Corporation, a Corporation herein called Schenley, and Hedgeside Distillery Corporation, a Corporation herein called Hedgeside." The document is three pages in length. It is signed, "Schenley Distillers Corporation, by James E. Woolsey, its Assistant Secretary, Hedgeside Distillery Corporation, by Albert A. Axelrod, its Assistant Secretary." Attached is a memo, "H-7, 4-30-47". Petitioner's Exhibit Number 20 for Identification.

The next document is dated May 7, 1947, addressed to "Schenley Distillers Corporation, 850 Battery Street, San Francisco, California," three pages in length, signed "Hedgeside Distillery Cor-

(Testimony of Robert H. Baglin.)

poration, by R. I. Stone, its President", and then entirely handwritten in ink, "Accepted Schenley Distillers Corporation, by James E. Woolsey, its Assistant Secretary"; and there is also attached memo "H-8-5-7-47". That document will be Petitioner's Exhibit Number 21 for Identification. [193]

The next document is on a letterhead, Hedgeside Distillery Corporation, Alcohol Division, dated October 13, 1947, addressed to Schenley Distillers Corporation, 593 Market Street, San Francisco, California, attention of Mr. James E. Woolsey. The document itself is two pages in length, and is signed "Hedgeside Distillery Corporation, by R. I. Stone, approved Schenley Distillers Corporation, James E. Woolsey, Assistant Secretary", and attached to the letter——

Mr. La Shelle: I don't think it's attached. It's clipped. There are two different documents here. I guess they're both dated the same date.

The Referee: The document just referred to, dated October 18, 1947, to Schenley Distillers, signed by Hedgeside Distillery Corporation, by R. I. Stone, is Petitioner's Exhibit Number 22, for Identification.

Mr. La Shelle: I would suggest that if that is dated on the same day, that we can make these 22-a.

The Referee: We will make the one just referred to Petitioner's Exhibit 22-a.

Mr. La Shelle: The next one will be 22b.

The Referee: The next document, which will be marked Petitioner's Exhibit 22-b, is entitled in the first paragraph, "This contract is made and entered

(Testimony of Robert H. Baglin.)

into this 13th day of October, 1947, between Schenley Distillers Corporation, a Delaware Corporation, herein called Schenley, and Hedgeside Distillery Corporation, a California Corporation, herein called Hedgeside," [194] and according to the numbers on the document, it is 28 pages in length, and is signed "Schenley Distillers Corporation, by James E. Woolsey, Assistant Secretary, Hedgeside Distillery Corporation, by R. I. Stone, President". Petitioner's Exhibit Number 22-b for Identification.

The next document is on a letterhead marked, "Schenley Distillers Corporation, 582 Market Street, San Francisco 4, California," and it is dated December 5, 1945, addressed to R. I. Stone, 18 Sixteenth Avenue, San Francisco, California, signed "Very truly yours, Schenley Distillers Corporation, M. J. Nauheim, Vice President. Accepted and agreed to, R. I. Stone, d.b.a Franciscan Farm and Livestock Co."

Mr. La Shelle, do you want that letter to be one Exhibit for Identification purposes? I see there are other documents attached to it.

(Discussion off the record.)

Mr. La Shelle: Those should be separate.

The Referee: The letter just referred to——

Mr. La Shelle: I think if that's later in point of time, it would be better if you put this first.

The Referee: The letter just referred to will be marked Petitioner's Exhibit Number 24.

(Discussion off the record.)

The Referee: So the document just referred to

(Testimony of Robert H. Baglin.)

is Petitioner's Exhibit Number 24 for Identification.

Mr. La Shelle: 23 is coming up. [195]

The Referee: The next document is addressed to R. I. Stone, 18 Sixteenth Avenue, San Francisco, California. According to the notation on the sheets, the last page is page 10, dated the 1st day of November, 1945, "Schenley Distillers Corporation, by M. J. Nauheim, Vice President, Accepted and agreed to, R. I. Stone." No indication under Stone's name. That will be marked Petitioner's Exhibit 23 for Identification.

Mr. Fisk: Are you going to leave these copies, or are you going to take them away from us?

Mr. La Shelle: Well, I tell you, I am giving them to you now, as a matter of courtesy, so you can look them over. I'll be glad to share them with you or let you make copies yourself. I haven't got any extra copies. I've got one photostatic copy here that I want to substitute as soon as I can, because the Company wants these original records back. I told them to make three copies, but they didn't. I might be able to find some extra copies, I don't know.

Mr. Fisk: That's all right. I don't mean that. I don't want to impose on you to furnish me with a copy, except that I would like to have them, so I could make copies. They are quite voluminous, and it will take some little time to digest it.

Mr. La Shelle: Except that you will find that most of them are obsolete.

(Testimony of Robert H. Baglin.)

Mr. Fisk: Obsolete? [196]

Mr. Walsh: Obsolete?

Mr. La Shelle: I mean, they are spirits that are not in question here, that were produced under those earlier contracts.

The Referee: Well, then, what is the relevancy?

Mr. La Shelle: I am just having them marked for Identification, so if they look for anything, regardless, they can have them. We have nothing to **hide**.

(Laughter.)

Mr. Fisk: On that basis, I assume you are going to let us have copies?

Mr. La Shelle: I am, I am not obligated. As a matter of courtesy, I am giving them to you; if you want to keep them over night, that's fine. I'll share them with you. I may need them later on, but for the time being, at least, you can have them. I wanted to have extra copies made, so they can give you one. As a matter, I specified white, and I got a few white and mostly black, and that's the way things go.

The Referee: Very well, gentlemen; the next document is dated October 13, 1947, addressed to "Schenley Distillers Corporation, 593 Market Street, San Francisco, California, Attention of Mr. James E. Woolsey", signed, "Franciscan Farm and Livestock Co., by R. I. Stone". Also on the document, "Schenley Distillers Corporation, Approved James E. Woolsey, Assistant Secretary". Now, that will be

(Testimony of Robert H. Baglin.)

marked Petitioner's Exhibit Number 25 for Identification. [197]

Mr. La Shelle, there is also a contract. Would that be a separate Exhibit?

Mr. La Shelle: Is that the same date?

The Referee: It's the same date.

Mr. La Shelle: Yes, why don't we do that—25-a and 25-b.

The Referee: That document will be marked Petitioner's Exhibit 25-a for Identification, and a document entitled "Contract made and entered into this 13th day of October, 1947, among Schenley Distillers Corporation, a Delaware Corporation, herein called Schenley, Franciscan Farm and Livestock Co., a California Corporation, herein called Franciscan, and R. I. Stone, an individual, herein called Stone." The document is 19 pages in length, signed, "Schenley Distillers Corporation, by James E. Woolsey, Assistant Secretary, Franciscan Farm and Livestock Co., by R. I. Stone, President, and R. I. Stone". That will be marked Petitioner's Exhibit Number 25-b for Identification.

Mr. La Shelle: Well, again, I find myself in a set of circumstances. I would like Mr. Riley to give you his books, so he can go back in just a couple of minutes.

The Referee: Very well, Mr. Baglin is temporarily excused. Mr. Riley? Mr. Fisk.

* * * * * [198]

(Testimony of Robert H. Baglin.)

Further Direct Examination

Mr. La Shelle: Q. Now, Mr. Baglin, you told us that Mr. Tredici was up there, checking the batches of production as they were produced?

A. That's right.

Q. Now——

Mr. Walsh: Just a minute. To preserve the record, you mean both the production at Franciscan and the production at Hedgeside?

Mr. La Shelle: That's right.

Mr. Walsh: Both.

Mr. La Shelle: Q. And not the exact date, but approximately when did he start doing that?

A. I would say it would be sometime possibly in November of 1947.

Mr. Walsh: I am going to ask that answer go out as not proper direct examination. In other words, there is no [208] foundation laid. They could produce this witness.

Mr. La Shelle: We will produce Mr. Tredici. I can't put every witness on the stand at once, Your Honor. I am putting this man on; he was in charge, general charge of the operation, to show generally how it was handled. That's all. Mr. Tredici will be produced, unless he dies in the meantime.

The Referee: Very well, then, proceed.

Mr. Walsh: Just a minute, Your Honor; if Mr. Tredici, or whatever his name is, is the best man to answer the particular question asked. He said, "possibly". He's not even sure of that.

(Testimony of Robert H. Baglin.)

The Referee: As I understand from Mr. La Shelle's former statement, he just wanted to give generally the background, and then you were going into the matters that have some importance. Is that correct?

Mr. La Shelle: That's right.

The Referee: And certainly, as far as the date is concerned, that Mr. Tredici was there, if Mr. Tredici is going to be here later on, you will furnish that—Mr. Tredici's statement as to the date; it has precedence over this witness. Will you?

Mr. La Shelle: Yes.

Mr. Fisk: Are you going to produce Mr. Tredici?

Mr. La Shelle: Yes sir. You seem to think we want to hide everything.

Mr. Walsh: To save the record, you have been objecting [209] very loudly about cluttering up the record, and you are doing just what you accuse us of. In other words, why ask this man something that a man who knows something about it can testify?

Mr. La Shelle: This man was in general charge of the operation, isn't that right?

The Witness: That's correct.

The Referee: Mr. Walsh's objection is overruled, based on the statement that Mr. La Shelle has made with reference to the production of Mr. Tredici at a later date, and with the further statement that his date will be the controlling date. Now proceed.

Mr. La Shelle: Q. Now, directing your attention to the period of time following October 13, 1947,

(Testimony of Robert H. Baglin.)

what were your general duties with reference to processing this production and purchasing it, and so forth; what did you do?

Mr. Walsh: Now, if Your Honor please, I am going to object—

The Referee: Before you do, Mr. Walsh, Mr. La Shelle will be a little more explicit with reference to what processing are you talking about.

Mr. La Shelle: With reference to the purchase and sale of these spirits.

The Referee: You mean, that are the subject of this litigation before the Court?

Mr. La Shelle: That's it, Your Honor.

The Referee: Go ahead, Mr. Walsh. [210]

Mr. Walsh: I withdraw that objection.

The Witness: A. Mr. del Tredici would perform certain laboratory experiments to determine whether or not the spirits were suitable for beverage purpose, or suitable for redistillation. He would be given the invoices of the Hedgeside Distillery Corporation, which would indicate the price at which we were to purchase the spirits, either as beverage spirits or for redistillation.

Mr. La Shelle: I take it, if I may interrupt you for a moment, there was a difference in the price, naturally.

A. There was a difference in price. Mr. del Tredici would sign these invoices, two copies of which would be directed to my attention in San Francisco, the other two copies would be given back to Hedgeside.

(Testimony of Robert H. Baglin.)

Mr. Walsh: Your Honor, how much of this testimony are you going to permit to go in? The testimony that Mr. Tredici is the only man who can testify to.

The Referee: You are making an objection?

Mr. Walsh: Yes, Your Honor.

The Referee: Sustained.

Mr. Fisk: I'll join in the objection.

The Referee: Sustained.

Mr. La Shelle: I think this man can state, being in charge of the overall production, what the man's duties were to do.

The Referee: I know, Mr. La Shelle, but this witness [211] is testifying now as to what Mr. Tredici was doing on them, and you are going to have Mr. Tredici here. We might as well get it firsthand.

Mr. La Shelle: Q. Suppose we put it this way: Let's assume that a certain invoice or a certain document comes down for the purchase and sale of a lot of spirits; what came through, and what did you do with it?

A. Two copies of the invoice came to my attention; I would direct one to the Accounts Payable section——

Q. Wait a minute. When they came, did they have any notation on the form to a particular employee?

A. Yes, they were signed by Mr. del Tredici.

Q. And did they have an okay, or words to that effect?

A. They did.

(Testimony of Robert H. Baglin.)

Q. And then, when you got those, what did you do with them?

A. I directed one copy to the Accounts Payable section, and the other copy to the Inventory section.

Q. Then they were processed for payment pursuant to your giving them to the Accounts Payable section, I take it?

A. That is correct.

Q. And then, when the invoices came in, did they have on them—we will produce these later, Your Honor—the warehouse receipt number covering them, and so forth?

A. They would.

Q. And in making payment to those, whom did Schenley pay?

A. Schenley paid the Anglo California Bank.

Q. And what did you do with reference to picking up the warehouse receipts?

A. I don't know the mechanics of our Accounts Payable section, whether the bank messengers picked up their checks and made delivery of the warehouse receipts, or whether their own messenger went to the bank, made payment, and picked up the warehouse receipts.

Mr. Fisk: Your Honor, I am going to enter an objection to this line of testimony, for the reason it is apparent that what Counsel is trying to do is to claim some kind of an estoppel on the part of the bank, because certain of these invoices went through the bank's Escrow Department, or something of that kind. Now, if he is going to do that, he is not talking about the general practice of Schenley's. He is talking about specific transactions. Obviously, Schen-

(Testimony of Robert H. Baglin.)

ley's didn't make a practice of sending or processing every transaction through the Anglo Bank.

And I am going to ask that his testimony go out on that ground.

Mr. La Shelle: I submit that's all right if it would serve to show the same thing, that the same general practice was done.

Mr. Fisk: It isn't general practice. He is talking about specific transactions.

The Referee: I sustain Mr. Fisk's objection.

Mr. La Shelle: Q. When you got the two invoices with [213] Walter Tredici's okay on them, and the invoice showed the number of the warehouse receipts, at the same time that you got the invoice did you get the warehouse receipts with the invoice? A. No, I did not.

Q. And with reference to the exact mechanics, as to how you got that invoice, you don't know; that went through another Accounts Payable section, is that correct?

A. I don't believe I get your question, Mr. La Shelle.

Q. Do you know of your own knowledge how or from whom you ultimately got the warehouse receipts on invoices that were paid?

A. That's right.

The Referee: What do you mean, "that's right"? Do you know?

The Witness: Yes, I do.

Mr. La Shelle: Q. Well, how did——

(Testimony of Robert H. Baglin.)

A. Through the bank, of course. Anglo California Bank.

Mr. Fisk: Your Honor, I am going to renew my objection—make an objection that it is irrelevant, incompetent, and immaterial in this proceeding as to what they did generally. After all, if he is going to show that in this case, these particular warehouse receipts were processed in a particular way, it's the easiest way in the world to put a witness on. He can even subpoena someone from the bank to do it.

The Referee: Sustained. [214]

Mr. Fisk: I don't know how this is enlightening.

Mr. La Shelle: Well, he states he knows.

Mr. Fisk: He doesn't know.

Mr. La Shelle: He was in general charge of the operation. Surely, if the girl in the Accounting Department or the clerk got it, you would never be able to prove that.

Mr. Fisk: I object. There is no proper foundation laid.

Mr. La Shelle: That's all. You may cross examine.

Mr. Fisk: No cross examination.

Mr. Walsh: No cross examination on behalf of the Trustee.

The Referee: You are excused, Mr. Baglin.

Mr. Walsh: Your Honor, please, I am going to make a motion at this time, on behalf of the Trustee, that all the testimony of this witness go out.

Mr. Fisk: And I will join in.

The Referee: Well, Mr. Walsh, I don't know that there is any testimony in.

Mr. Walsh: I don't like to have the record cluttered up, if Your Honor please.

The Referee: I don't know what there is, if there is anything. He gave his name and address.

Mr. Fisk: I'll join with him, because Mr. La Shelle made that offer——

Mr. La Shelle: He states he was in general charge of [215] the operation. He okayed the bills; they came through him.

Mr. Walsh: This is off the record.

(Discussion off the record.)

The Referee: Well, so the record will be clear, the Court has already ruled on the individual objections that have been made, and the Court is denying the motion of Mr. Walsh and Mr. Fisk that the entire testimony be stricken.

Mr. La Shelle: All right. We will resume with Mr. Johnson now, if we may.

Mr. Johnson now, is we may. * * * * * [216]

WALTER DEL TREDICI

called as a witness on behalf of the Petitioner, being first duly sworn, testified as follows:

The Referee: Q. What is your name?

A. Walter Del Tredici.

Q. And spell your last name.

A. Capital D-e-l, Capital T-r-e-d-i-c-i.

Q. Where do you reside, Mr. Del Tredici?

A. 329 Laurel Avenue, San Anselmo.

The Referee: You may proceed, Mr. La Shelle.

(Testimony of Walter Del Tredici.)

Direct Examination

Mr. La Shelle: Q. All right, Mr. Tredici; you are employed by Schenley's, are you not?

A. Yes.

Q. And directing your attention to the latter part of the year of 1947 and 1948, you were employed by Schenley at that time, too, were you not?

A. Yes, that's right.

Q. And directing your attention to either October or November—I have forgotten just which is the month—were you up at Napa on a job for Schenley?

A. That's right.

Q. And approximately when was it that you first went up there?

A. First started in October, 1947.

Q. You don't recall the exact date that you went up there?

A. It was about the last week in October. [234]

Q. About the last week in October. And what was your job up there, what were your duties that you did?

A. Well, it was to be Schenley's representative to approve or reject the distillation of Hedgeside Distillery up there.

Q. And that did apply also to Franciscan?

A. Yes.

Q. The plants were about ten miles apart, something like that.

A. That's right.

(Testimony of Walter Del Tredici.)

Q. And you were up there to approximately how long? A. Well, to May 19, 1948.

Q. And with reference to the distillation and production up there, am I correct in stating that there were two types; one would be accepted for beverage purposes, and one would be accepted for redistillation? A. Right.

Q. And there was a certain price which would govern each? A. Right.

Q. And it was part of your duties to check that and to make laboratory tests of some metals up there? A. Right.

Q. And when a batch of production came off the assembly line, so to speak, would you just tell the Court what you did there?

A. Well, each morning I went up to work, and they would have the sample ready for my approval or rejection, and I would perform the chemical test, and then I would put in writing the results of my findings, and would instruct Hedgeside whether to put them in barrels or in steel drums. [235]

Q. In other words, you would tell Hedgeside whether or not you accepted it for beverage purposes, or had it labeled for redistillation?

A. Right.

Q. I take it, from time to time you had a number of arguments over that? Yes, we did.

Q. And those tests were made before or after barreling? A. Before barreling.

Q. And would those generally be made in the cistern room, or where would you make them?

(Testimony of Walter Del Tredici.)

A. I made them down at the Distillery.

Q. Down at the Distillery? A. Yes.

Q. And then did you take for an examination a batch that you accepted for beverage purposes, you would communicate that to the Hedgeside officials, who were there at the time? A. Yes.

Q. And following that, did the Hedgeside people make up an invoice? A. Yes, they did.

Q. Then, was that invoice presented to you—

A. Yes.

Q. And what would you do with that invoice, then?

A. Then I approved the invoice for payment by our office.

Q. And in approving it, would you sign it?

A. I wrote, "Approved for payment", put the date of payment and my name.

Q. I see. And do you recall how many copies there were of those invoices?

A. About six copies. [236]

Q. About six copies. And were they the type of invoice that would have carbons between them?

A. That's right.

Q. Or did you sign each one?

A. All together. Had carbon between each sheet.

Q. So that your signature would carry through?

A. That's right.

Q. And after those invoices were given to you—I'll show you an invoice that we have just taken at random from Mr. Johnson, a Franciscan Farm and Livestock Company invoice, number 299, dated

(Testimony of Walter Del Tredici.)

April 5, 1948, covering ten barrels of spirits grain at a total purchase price of \$375.48; and there are some other notations on it that appear here; and then, down in the lower lefthand corner appears the words written in pencil, "Approved for payment, 4-5-45, Walter Del Tredici". Is that your handwriting? A. That's right.

Q. And on the various invoices, either from Franciscan or Hedgeside, whichever it happened to be, that's the practice you followed? A. Yes.

Mr. Walsh: Now, just a minute, if Your Honor please, I am going to object to that question, and ask the answer go out, on the ground it contains a compound question that requires a compound answer. The first question relates to the Franciscan production, and the other relates to the Hedgeside production, and I think the proper way would be [237] to produce records showing the production from Hedgeside. These are two different situations—one production of Hedgeside, and one production of Franciscan.

The Referee: Will you please read the question?

Mr. La Shelle: If he wants, I'll withdraw the question.

The Referee: Very well, question withdrawn.

Mr. La Shelle: Q. Did you do the same thing that you have just told us, directing your attention to the Franciscan Farm and Livestock Company invoice, to approve those for payment?

A. Yes, I did.

(Testimony of Walter Del Tredici.)

Q. In the manner that you just described, after checking it? A. Yes.

Q. And did you also do that for Hedgeside?

Mr. Walsh: I object to that question as incompetent, irrelevant, and immaterial, because the invoice that you have right there is not a Hedgeside invoice; it's a Franciscan.

Mr. La Shelle: Well, I don't think that it is incumbent upon us, Your Honor, to take each one of those invoices and have them qualified by this witness.

The Referee: Maybe we can simplify this, gentlemen. We have got to speed this up. Mr. Johnson, do you have a Hedgeside, too?

Mr. Johnson: Yes, I have a Hedgeside here, too, same type of thing.

Mr. La Shelle: Q. Here is a Hedgeside invoice, and this is Number 1139, dated December 22, 1947, total amount [238] \$284.73, and in the lower left-hand corner appears the words, "Approved for payment, 12-22-47, Walter Del Tredici"; is that your signature? A. That's right.

Q. And, therefore, on Hedgeside invoices, you processed them in the same manner that you have told us here a little while ago after checking them, and then when the invoice was made up you approved it? A. That's right.

Q. In other words, once the invoice was made up, as I understand it, you had already approved it? A. That's right.

Mr. Walsh: May I see that, Mr. La Shelle?

(Testimony of Walter Del Tredici.)

Mr. La Shelle: Q. In other words, to clarify that, no invoice was made up until after you had passed on it, but for the reason that depending on whether or not it was for beverage purposes or re-distillation, the price would be different?

A. That's right.

Mr. Fisk: Objected to, as argumentative. I ask that the answer go out, Your Honor.

The Referee: It can go out, and Mr. La Shelle can accomplish the same purpose by reframing your question.

Mr. La Shelle: Q. What was the reason, then, to satisfy Counsel, that the invoices were not made up?

The Referee: Counsel said that your question was argumentative.

Mr. La Shelle: Q. What was the reason the invoices were not made up until after they were passed on? [239]

A. First of all, I had to make the tests and tell them what to do, and then they had to do a filldown, and then after the filldown the invoices were made up, and then I approved them.

Q. Let me ask you this, was there a difference in price between the two? A. Yes.

Q. Would that play a part in holding it up—

A. Very important part.

Mr. Fisk: Has the witness testified that there was a re-distillation plant at both Franciscan and—

Mr. La Shelle: Oh, no, I think off the record.

(Discussion off the record.)

(Testimony of Walter Del Tredici.)

Mr. La Shelle: Q. Was anything redistilled up there? A. Just on one occasion, yes.

(The last few questions and answers were read by the reporter.)

The Referee: For Identification, Petitioner's Exhibit Number 30, document entitled warehouse receipt number 3687-B, a pencilled memo, a check number 9447, in the amount of \$37.48, paid to the order of the Anglo California National Bank, signed by Schenley Distillers Corporation, W. E. Nauheim, appears to be W. E. Nauheim, Disbursement Account. Mr. Johnson, is that his name?

Mr. Johnson: Yes, that's right, the cashier.

The Referee: And a document entitled Schenley Distillers Corporation, Disbursement Account number 9947, sight draft, payment to Franciscan Farm and Livestock Co., [240] together with various other notations on them, and invoice number 299, entitled Franciscan Farm and Livestock Co., Yountville, California, Schenley Distillers Corporation, 10 barrels of spirit grain, with various other notations, \$375.48; also has a pencil notation, "Approved for payment", with a signature.

Another check in the amount of \$752.90, pay to the order of Anglo California National Bank, signed by Schenley Distillers Corporation, Disbursement Account, W. E. Nauheim.

Another document entitled Disbursement Account, Schenley Distillers Corporation, date April 9, 1948, check 12939, pay to the order of the Anglo California National Bank, sight draft payment to Fran-

(Testimony of Walter Del Tredici.)

ciscan Farm and Livestock Co., \$752.90, invoice number 301, Franciscan Farm and Livestock Co., addressed to Schenley Distillers Corporation, without address, 20 barrels of spirits grain, other notation, amounting to \$752.90, with a pencil notation, "Approved for payment", 4-7-48; and on both documents, the one heretofore referred and this one, appears to be the signature, Walter Del Tredici.

A check, Disbursement Account, pay to the order Anglo California National Bank, \$566.38, check 12938, signed Schenley Distillers Corporation, Disbursement Account, W. E. Nauheim.

Document entitled Schenley Distillers Corporation, number 9632, dated April 9, 1948, check number 12938, \$566.38, [241] pay to the order of Anglo California National Bank, sight draft, payment to Franciscan Farm and Livestock Co., \$566.38, also with other notations.

And, finally, invoice number 302 on the form of Franciscan Farm and Livestock Co., Yountville, California, to Schenley Distillers Corporation, 15 barrels of spirits grain, together with other notations, total \$566.38, pencil notation, "Approved for payment, 4-8-38", and the name Walter Del Tredici.

All those documents are marked Petitioner's Exhibit Number 30 for Identification.

Mr. Fisk: Off the record.

(Discussion off the record.)

The Referee: The warehouse receipt is dated December 27, 1948; the pencil memorandum has

(Testimony of Walter Del Tredici.)

various other entries, but it refers to check number 12879, 4-7-48.

The next document, the check is dated April 7, 1948. The next document is dated April 7, 1948. The next document, Invoice 299, is dated April 5, 1948. The next document, check \$752.90, is dated April 9, 1948. The next document referred to, with the sight draft notation, is dated April, 1948. The next document is invoice number 301, dated April 7, 1948. The next document is check in the sum of \$566.38, dated April 9, 1948. The next document is also on the same date, April 9, 1948, on the Disbursement Account, sight draft. And the last document, invoice number 302, dated April 7, 1948. [242]

Mr. La Shelle: Off the record, Mr. Fisk.

(Discussion off the record.)

Mr. La Shelle: Do you want to mark that other one, Judge?

The Referee: And the next group of documents will be marked for Identification, Petitioner's Exhibit 31 for Identification, consisting of the following documents:

Warehouse receipt number 3670-B, dated December 3, 1948, a pencil memo with the notation attached to W-R, number 3669-B. A check dated March 31, 1948, pay to the order of Anglo California National Bank. The amount of the check is \$3117.58, signed Schenley Distillers Corporation, Disbursement Account, W. E. Nauheim.

The next document, entitled number 9181, on Schenley Distillers Corporation form, Disbursement

(Testimony of Walter Del Tredici.)

Account, dated March 31, 1948, sight draft payment to Hedgeside Distillery Corporation, \$3117.58, together with other notations.

Invoice number 1215, dated March 29, 1948, on the form of Hedgeside Distillery Corporation, sold to Schenley Distillers Corporation, the amount \$3117.58, pencil notation "Approved for payment, 3-29-48", Walter Del Tredici, and there are other notations on the document.

A check dated December 29, 1947, in the amount of \$2484.73, pay to the order of Anglo California National Bank, signed Schenley Distillers Corporation, Disbursement Account; the signature cannot be made out by the Court, although it [243] appears to be "R. V." something.

The next document is on the form of Schenley Distillers Corporation, Disbursement Account number 4807, pay \$2484.73 to the order of Anglo California National Bank, sight draft payment to Hedgeside Distillery Corporation, same amount, various other notations on the document.

And the final invoice, number 1139, dated December 22, 1947, on the form Hedgeside Distillery Corporation, sold to Schenley Distillers Corporation 70 barrels spirits grain, \$2484.73, various other types and other notations appear on the invoice, and the pencil notation, "Approved for payment, 12-22-47, Walter Del Tredici".

All of those documents will be Petitioner's Exhibit Number 31 for Identification.

Mr. La Shelle: Q. Now, with reference to the

(Testimony of Walter Del Tredici.)

barreling of the production up there, that you passed upon, who furnished the barrels?

A. We did—Schenley Distillers Corporation.

Q. They furnished the barrels? A. Yes.

Q. And with reference to the Franciscan production and the Hedgeside production, you stated you worked at both plants? A. That's right.

Q. And with reference to the serial numbers of those two different plants, the registered distillers is the A.T.U. name for them, were you familiar with those serial numbers? And how they ran?

A. Yes. [244]

Q. And what sequence of numbers did the Franciscan run?

A. They were in four digit barrel—serial numbers were in four digit numbers.

Q. And how about Hedgeside?

A. They ran in five digit numbers.

Q. Now, after you okayed the invoice as you have told us, you didn't send those invoices down to Schenley, yourself, did you? A. No, I didn't.

Q. What did you do with them?

A. The girl—I just gave them back to the girl and she forwarded them to the necessary individuals in Schenley's.

Mr. Walsh: May I ask what girl you are talking about?

The Referee: Mr. Tredici, Mr. Walsh asked you a question.

Mr. Walsh: What girl do you have reference to when you say "the girl"?

(Testimony of Walter Del Tredici.)

The Witness: Pardon?

Mr. Walsh: Read the statement to him.

(The last answer was read by the reporter.)

The Witness: Well, I just happened to know they sent them to Mr. Baglin.

The Referee: No, Mr. Walsh's question is, when your answer said "the girl", he wants to know who is the girl.

The Witness: Well, she was the receptionist girl us there.

Mr. Walsh: Up where?

The Witness: Up at Hedgeside Distillery Corporation. [245]

The Referee: Do you know her name?

A. I am trying to think now; I don't recall her now.

Mr. Fisk: Q. The same girl in each case?

A. Pardon?

Q. The same girl in each case?

A. If she was there, mostly, yes.

Q. Well, I say, the same girl in the case of Franciscan as well as Hedgeside?

A. That's right.

Mr. La Shelle: Well, as long as you fellows are cross examining, you might as well go ahead. I'm through.

Mr. Walsh: We don't want to leave it up in the air. Are you all through now?

Mr. La Shelle: Yes.

Mr. Fisk: Are you only putting in these two in-

(Testimony of Walter Del Tredici.)

voices, or are you going to expect other warehouse receipts to go in through this witness?

Mr. La Shelle: Oh no, I am going to put on the warehouse receipts through Mr. Johnson. If I may ask another question:

Q. You had nothing to do with the warehouse receipts? A. No, I didn't.

Mr. Fisk: Off the record.

(Discussion off the record.)

Cross Examination

Mr. Fisk: Q. Mr. Del Tredici, I figured you spent your [246] time partly at the plant of Hedge-side and partly at the plant of Franciscan, did you not? A. That's right.

Q. Were they both operating at the same time?

A. That's right.

Q. And did Schenley have production contracts with each of them at that time?

A. I think they did.

Q. Did Franciscan—strike that out. The Franciscan production plant was commonly known as Mountain View, was it not? A. Yes.

Q. Did Franciscan operate an Internal Revenue Bonded Warehouse at that time? A. Yes.

Q. They did?

A. (Witness nods affirmatively.)

The Referee: Just a minute, Mr. Del Tredici, the court reporter doesn't get the nod.

The Witness: Oh, I'm awfully sorry.

The Referee: The answer?

(Testimony of Walter Del Tredici.)

The Witness: Yes.

Mr. Fisk: Q. Hedgeside was also operating an Internal Bonded Warehouse, was it not?

A. Yes.

Q. Was the production of Mountain View stored at the Internal Revenue Bonded Warehouse at Hedgeside?

A. Sometimes; on several occasions.

Q. Well, wasn't it usually stored there during that period you were there? [247]

A. Well, as far as I can remember, the Mountain View didn't have an I.R.B.W. qualified, and until it was qualified they stored it at Hedgeside.

Q. So during this period you were there, all of this production was stored at the Hedgeside Internal Revenue Bonded Warehouse, is that right?

A. Yes, until the I.R.B.W. at Mountain View was qualified.

Q. And was it qualified during the time you were there? A. Yes.

Q. Do you recall when you were qualified?

A. No, I don't.

Q. Now, you took your samples of specimens that you made your chemical analysis from, from the cistern room, you say?

A. From the receiving tanks in the receiving room.

Q. From the receiving tanks in the receiving room. And that is located at the distillery, is that right? A. Yes.

(Testimony of Walter Del Tredici.)

Q. Would you sample each day's productions?

A. Yes.

Q. You would only make one sample—Strike that out. Was there only one tank there to cover one day's production? A. No.

Q. So that each day you would make a chemical analysis of the day's production, which was contained in a tank located at the Distillery, is that right? A. Yes. [248]

Q. Was the production always barrelled on the same day it was produced? A. No.

Q. How much time lapsed between the production and the barrelling?

A. Well, if it all happened on a weekend, why, there would be from 24 to maybe 48 hours.

Q. Was the Government gauger there at all times when this production was taking place?

A. Yes.

Q. And the Government gauger marked each of the barrels or containers as the production was taken out of the tanks, is that right?

A. Well, the gauger didn't mark the barrels.

Q. Well, he supervised the marking, is that right? A. Yes.

Q. An employee of Hedgeside in each case marked the barrels, is that right? A. Yes.

Q. Where is the cistern room located?

A. Which place?

Q. Either place.

A. In Hedgeside, the cistern room is located right next to the I.R.B.W.

(Testimony of Walter Del Tredici.)

Q. In the same building, is that right?

A. Yes.

Q. What was the case at Mountain View?

A. It was in the—at Mountain View it was located in the Distillery Building.

Q. Now, I show you Petitioner's Exhibit for Identification [249] 3670-B, the first document in that Exhibit, which is warehouse receipt, Hedgeside warehouse receipt number 3670-B, dated December 3, 1948; looking at that warehouse receipt, can you tell me— Strike that out. That warehouse receipt has reference to 145 barrels of spirits grain, has it not?

Mr. La Shelle: Just a minute, Your Honor, if I may object to that question as not being proper cross examination. While these are all clipped together for convenience, this set I have only examined on the invoice. He has stated on direct he knows nothing about the warehouse receipt in question. It is not proper cross examination.

Mr. Fisk: Well, Your Honor, I submit——

The Referee: Wait a minute, gentlemen, before you go on with that. Mr. Fisk, when you were asking the question, I don't believe the record has the Exhibit. The Exhibit that is being referred to now, on the basis of the objection is Petitioner's Exhibit 31. I think Mr. Fisk's statement was——

Mr. Fisk: 30. I made a mistake. I have 30 in my hand. I meant to say 31.

The Referee: You are referring to 31 for Identification, Mr. Fisk?

(Testimony of Walter Del Tredici.)

Mr. Fisk: Yes.

The Referee: Now, Mr. La Shelle, you make your—

Mr. La Shelle: The objection is this, Your Honor: While these are clipped together as all supporting documents, [250] for convenience's sake for the record, for the later introduction in evidence, the only thing that this man was examined on was the invoice, what he did with the invoice and his approval. He has stated on direct examination that he had nothing to do with the warehouse receipts. He gave the invoice back, and that was the end of it. Now, he is being cross examined on the warehouse receipts, which is not proper cross examination.

Mr. Fisk: Your Honor, this is preliminary in the first place, and in the second place I see no point in putting all these documents up before the Court and before the witness if all he is testifying to is the invoice. Obviously, they are there for a purpose.

Mr. La Shelle: No, they are not.

Mr. Fisk: Counsel wants to show the connection between the documents.

The Referee: Objection sustained.

Mr. Fisk: Q. Take a single day's production, Mr. Tredici, or take any particular day; at what time of the day did you usually, or just mechanically how did you receive your sample that you made your chemical analysis of?

A. Well, when I reported to work in the morn-

(Testimony of Walter Del Tredici.)

ing, generally they had the sample taken from the tank.

Q. That is, a Hedgeside employee took the sample? A. Yes.

Q. And he had it in a container, such as a bottle, I see? [251] A. Four ounce bottle.

Q. And did he have that bottle labelled?

A. Yes.

Q. And so he just simply just turned that bottle over to you, and you made a chemical analysis of the contents, is that right? A. Yes.

Q. Now, did you personally do anything with respect to the contents of the—what you call the concentration tank; what is the tank that they store the production in at the end of the distillation before it's barrelled? A. The receiving tank.

Q. The receiving tank.

A. What was your question?

Q. Did you, personally, do anything with respect to the contents of the receiving tank, or did you just take this sample and analyze it?

A. Just take the sample.

Q. You had nothing to do with the mechanics of barreling the production? A. No.

Q. Nor did you supervise that?

A. I supervised it to make sure that it went into barrel and into drum.

Q. I see. As I understand it, if it was for redistillation, it went into a metal drum? A. Yes.

Q. If it were for beverage purposes, it went into an oak barrel for ageing? A. Yes. [252]

(Testimony of Walter Del Tredici.)

Q. Take a single day's production. In the morning you came in and got your sample, and with respect to that time, when would the contents of the receiving tank be barreled?

A. Well, it could—sometimes it would be barrelled in the afternoon if it was still on hand in the receiving tank. It would take an hour for me to make a test; and if I okayed it, it would take another hour to pump it into the cistern room.

Q. Would Hedgeside hold up barreling it until you had made your chemical analysis?

A. Yes.

Q. After you had made your chemical analysis, why, they then pumped the production from the receiving tank up to the cistern room, and it was there barreled, is that right? A. Yes.

Q. Now, with respect to the time that you made this chemical analysis, when did you receive this invoice that you were testifying about?

A. Sometime at the end of the day when the barreling was completed.

Q. From whom did you receive the invoice in the case of Hedgeside?

A. From this girl; I just happen to remember her name is Helen Husted.

Q. All during that period, you received it from the same girl, except when she had a substitute because of not being there, or something of that kind; is that right? A. Yes. [253]

Q. And the same thing is true as to the invoice you received from Franciscan, is that right?

(Testimony of Walter Del Tredici.)

A. Yes.

Q. Were there any papers accompanying the invoice when you did receive it? A. No.

Q. In connection with your duties there, did you execute any other papers than approving these invoices? A. No.

Q. You did not. Did you keep any records of what you had done? A. Yes.

Q. What was the nature of the record you kept?

A. It was just merely a record, so that I could—so that I knew what I was signing.

Q. Now, the invoice was in six copies, I believe you said. A. Yes.

Q. That was all made out by the Hedgeside employees? A. Yes.

Q. Did you retain any of it? A. No.

Q. But there were carbons between them and your approval prepared on all six copies, is that right? A. Yes.

Q. You turned them back through the girl, and then she took care of the further processing of the invoices, is that right? A. Yes.

Q. You had nothing whatsoever to do with the payment of the invoice, did you?

A. Outside of signing the invoice, no. [254]

Q. In other words, you don't know whether or not they were paid, or how they were paid, or who paid them? A. No.

Q. Did you do anything with respect to the warehousing of the production?

A. To the warehousing?

(Testimony of Walter Del Tredici.)

Q. Yes. A. No.

Q. It was not a portion of your duties to determine where the production was warehoused, or when it was warehoused, or in whose name it was warehouse? A. No.

Q. Well, I assume, of course, that when you okayed these invoices, that this production was then property of Hedgeside, is that right?

Mr. La Shelle: Just a moment. We will object to that as calling for the witness's conclusion and opinion.

The Referee: Sustained.

Mr. Fisk: Q. Now, you have testified that Mountain View production consisted of four digits and Hedgeside of five digits. Will you look at the top document of Petitioner's Exhibit 31, which is warehouse receipt number 3670-B, and tell me whether you can testify from that what production is covered by that warehouse receipt.

A. This is covered by Hedgeside Distillery.

Q. In other words, that covers production of Hedgeside? A. That's right.

Q. What is the basis of your testimony? Will you explain it from looking at that document? [255]

A. From the barrel serial number range up—five digits.

The Referee: Pardon me, Mr. Fisk. Mr. Del Tredici, will you be so kind as to turn that document over? You are testifying with reference to Exhibit Number what?

The Witness: Thirty-one.

(Testimony of Walter Del Tredici.)

The Referee: For identification. Very well.

Mr. Fisk: Q. That is the warehouse receipt document in that Exhibit? A. Yes.

Q. Here I see the notation, "X Mountain View, I.R.B.W.—111". Does that have any significance to you in that connection?

A. What does it mean?

Q. I am asking you, does it have any significance to you, in connection with the identifying of the production?

A. No, it has nothing to do with the identity of the production.

Q. So far as you know?

A. So far as I know.

Q. Is it not true that invariably the production was barreled and warehoused before you okayed the invoice? A. Yes.

Mr. La Shelle: What was that? I didn't understand it. Read that question, will you?

(The last question was read by the reporter.)

Mr. La Shelle: I wonder if I can interrupt for just a moment.

The Referee: I was just going to wait until Mr. Fisk had finished, because regardless of the answer, the Court [256] certainly sometime will have to be in a position to decide this matter, and I think at the moment I have two answers that don't coincide with one another. But you may continue, Mr. Fisk.

Mr. Fisk: I want to ask a couple of other questions.

(Testimony of Walter Del Tredici.)

Q. How far was the Mountain View Distillery located from the Hedgeside Distillery?

A. About ten miles.

Q. Was the production of Mountain View conveyed from the receiving tanks to the receiving room in the same manner as it was at Hedgeside?

A. No.

Q. At Hedgeside, the Distillery was at one side of the property, and the Internal Revenue Bonded Warehouse Number 2 on the other side, was it not—over the hill? A. Yes.

Q. And the receiving tank at the Distillery was piped through the warehouse, is that right?

A. The question is a little misleading. You are speaking of Hedgeside now, aren't you?

Q. Yes, I am talking of Hedgeside.

A. They went from the receiving tank into the cistern tank.

Q. And the cistern tank was located in the cistern room, which was in the Internal Revenue Bonded Warehouse, is that right? A. Yes.

Q. Even though it was several hundred yards apart? A. Yes. [257]

Q. And the production was conveyed there by pump through pipe lines, is that right?

A. Yes.

Q. Now, how was the same matter handled in the case of Mountain View?

A. At Mountain View, it went direct from the still into the receiving tank, and that's as far as it went. From there, it went into the barrels.

(Testimony of Walter Del Tredici.)

Q. And was the production of Mountain View barreled at the Mountain View premises?

A. Yes.

Q. And I take it, then, your so-called cistern room, in the case of Mountain View, was right at the still, is that right? A. Yes.

Q. And then, in the case of Mountain View, after barreling the production, it was then transported by truck over to Internal Revenue Bonded Warehouse Number 2 of Hedgeside, is that right?

A. Not all cases.

Q. Well, that was the usual case?

A. Yes, the usual case, yes.

Q. That was the situation, whether the production was barreled as a beverage in an oak barrel or in a metal drum for other purposes?

A. Yes.

Q. Was it your duty to make this inspection in the case of all of the purchases by Schenley of Hedgeside and Franciscan, or only the production purchased under their contracts?

A. Only the production.

Q. Purchased under their contracts?

A. Yes. [258]

Q. They are term contracts, we will call them?

A. Yes.

The Referee: Wait a minute; what did you say? All of their production?

The Witness: Yes, all of their production.

The Referee: Then, what you mean, you mean

(Testimony of Walter Del Tredici.)

all of their production, or just the production under the contracts?

A. The production under the current contract that I was sent up for.

Mr. Fisk: Q. In other words, an isolated transaction you went there to inspect material in that case? A. No.

Q. Do you know who made out the invoice?

A. This one in Hedgeside office, Helen Husted.

Q. She made them all out, is that correct, with possibly one or two exceptions?

A. Well, maybe I should explain that more. Mr. McMains would compute, and Helen Husted did the typing of the invoice.

Q. Now, who is Mr. McMains?

A. The Secretary of the Hedgeside Distillery Corporation.

Q. And he had an office there, at Hedgeside?

A. Yes.

Q. And were all of Franciscan books kept there at Hedgeside, as far as you know?

A. As far as I know.

Q. Now, Mr. R. I. Stone, do you know him?

A. Yes. [259]

Q. Did you have any dealings with him, in connection with the approval of these invoices?

A. Yes.

Q. Well, generally speaking, what were your dealings with him in connection with these invoices?

A. I told him the results of my chemical tests each day. I approved the samples or rejected them.

(Testimony of Walter Del Tredici.)

Q. In every instance, you would tell Mr. Stone the results of your tests?

A. Yes. Either Mr. Stone or Mr. Robert.

Q. Did you give Mr. Stone or Mr. Robert any written statement of your findings? A. Yes.

Q. In what form?

A. It took the form of that lot number so-and-so, and such a tank was approved for beverage purposes or for redistillation.

Q. And you signed that document?

A. Yes.

Q. And you turned it over to Mr. Stone and Mr. Robert? A. Yes.

Q. Did you keep a copy? A. Yes.

Q. In each instance? A. Yes.

Q. Did you give any record of any kind to the Government gauger? A. No.

Q. Did you have any dealings with the Government gauger at all—business dealings, I mean?

A. No.

Q. You stated that Mountain View's serial numbers ran in four digits, and Hedgeside's in five digits. You, of course, had reference to the period you were there in those [260] respective places, is that right? A. Yes.

Q. As a matter of fact, each one of them commenced with the serial number 1, isn't that correct?

A. Yes.

Q. The reason for the difference in the number of digits in this case was that the production of one

(Testimony of Walter Del Tredici.)

of them had gone along a great deal further than the other one had, is that right?

A. Well, I'm in no position to answer that. I wouldn't know the answer.

Q. Well, don't you know from your experience in the business that you're in that a Distillery starts with the numeral 1 and keeps going on up numerically as long as it produces in barrels, spirits?

A. Yes.

Mr. La Shelle: Just a moment. I'll object to that, Your Honor, as being argumentative, and he has also answered the question, and the question as to why one got ahead of the other is an argumentative question.

The Referee: Sustained. He said he wasn't in any position to know.

Mr. Fisk: Well, Your Honor, I recognize the Court has ruled on that, but I think, if I understand correctly the witness' testimony in the records appears that all of the serial numbers and the production of Mountain View are in four digits. That is not true. And all of the Hedgeside in five digits; that isn't true.

Mr. La Shelle: Now are you testifying, Mr. Fisk? [261]

The Referee: Wait a minute, Mr. La Shelle.

(The last question was read by the reporter.)

Mr. Fisk: May I ask this question? I'll go at it this way:

Q. Do you know whether or not the production

(Testimony of Walter Del Tredici.)

of Hedgeside has always been designated by five digits?

A. They were five digits when I started to work up there; they were in the five digit bracket.

Q. And they were when you left? A. Yes.

Q. But that's the only period you know about?

A. That's right.

Q. You have no personal knowledge of the manner or the reason behind placing serial numbers on barrels of spirits, have you?

A. Will you repeat that question again?

(The last question was read by the reporter.)

A. No.

Mr. Fisk: Your Honor, that is all that I have at this time. If the Court is not going to run much longer, I would like to, upon a further examination of these two Exhibits against the schedules—I haven't been able to jibe it in with the schedules here; I might want to pursue my examination a little further.

Mr. La Shelle: Well, I just don't see. This witness was put on essentially, Your Honor, about the invoices, nothing to do with any of those other Exhibits that are [262] clipped together only for convenience purposes. He doesn't know anything about the warehouse receipts, he doesn't know anything about the payments, he doesn't know anything other than what he approves on those invoices. I just don't see the necessity of his coming down here. I mean, after all, we can't interrupt everybody, just to wait around to be witnesses.

(Testimony of Walter Del Tredici.)

The Referee: Before I answer that, so the Court will have this matter clear, you stated that in some instances, or in most instances, the invoices were made out after the whisky had already been barrelled in oak barrels and steel barrels, is that correct? The Witness: Yes.

The Referee: Now, was some written document made by you, prior to that time? A. Yes.

Q. That would indicate into which barrels the particular whisky would go? A. Yes.

The Referee: Very well. Now, on this other matter, Mr. Fisk, did you want to pursue that further?

Mr. Fisk: Well, I certainly want to examine the witness further, based on that, because he just a moment ago said that there were documents that he signed up there.

The Referee: Well, that's the reason the Court asked him that particular question, because, after all, if I'm going to have two different answers, I am not going to guess at it, [263] if I have an opportunity to clarify it, and that's the reason the Court asked the questions.

Mr. Walsh: He testified very definitely, Your Honor, he never executed any other papers.

Mr. Fisk: That's right.

The Referee: Mr. Walsh, unequivocally, as far as the Court is concerned, I never in the world would have asked the witness the question, unless I heard with my own ears two different answers. That's the reason I asked him the questions. Well, in any event, Mr. Fisk, you will not be precluded from fur-

(Testimony of Walter Del Tredici.)

ther examination; in the event that you feel that you can dispose of the matter this evening, the Court with the permission of the court reporter will go on further. I would like to cooperate with the witness. I would prefer not to bring him back here again, if we are only going to be here a short time.

Mr. La Shelle: I would like to point out, Your Honor, that this witness was only examined with reference to that invoice of that Exhibit. He was not examined as to any of those other papers, and I only mark them all for Identification because they're clipped together, and for no other purpose in this case; and I just didn't want to upset my accountant. He was not examined on any of those other papers, and he has disclaimed any knowledge of the warehouse receipts or other papers after he signed the papers.

The Referee: Yes, but Mr. La Shelle,—he did testify [264] that in making his chemical analyses it was up to him to decide as to whether or not the whisky would go into the oak barrels or the steel drums, isn't that true?

The Witness: Yes.

Mr. Fisk: And both the testimony and the warehouse receipts show that it was warehoused before he signed the invoice.

Mr. La Shelle: I would like to ask a few questions on that.

The Referee: Now, wait a minute, gentlemen.

Mr. Walsh: This is cross examination.

The Referee: The first thing that we are going to

(Testimony of Walter Del Tredici.)

decide is whether or not we are going to adjourn now and whether we are going to have quite a lengthy examination with this present witness—cross examination; the Court is going to adjourn.

Mr. Walsh: Well, Your Honor, I haven't started my cross examination yet.

The Referee: Mr. Walsh, that's the reason I am stating that. Mr. Fisk said he had nothing further until the Court asked the questions and then changed the impression. But, in any event, Mr. Fisk, are you in position to say how much time you will need with the present witness who is on the stand?

Mr. Fisk: I am not in a position because I am very much puzzled on the witness' testimony, and it is coupled with the fact that I am not making an objection on this, [265] because Mr. La Shelle has been exceedingly courteous to me. This witness' testimony has got to dovetail, or I take it is intended to dovetail, into something else, and on such short notice I haven't had an opportunity to really get into what the purpose of the testimony is. Now, I don't think—I think, in view of the late hour, I don't see how anyone is going to be——

Mr. La Shelle: The main purpose of this testimony is simply to show that he approved these invoices and that the goods were accepted by Schenley under the contract at that time. That's its main purpose.

Mr. Walsh: Mr. La Shelle, in your direct examination you have opened up a course of cross ex-

(Testimony of Walter Del Tredici.)

amination, which I intend to pursue, and I can't do it tonight.

Mr. La Shelle: I didn't know you had any cross examination.

Mr. Walsh: In other words, you put on a witness and we are entitled to properly cross examine.

Mr. La Shelle: However, there are a few questions I would like to ask.

Mr. Walsh: I submit, Your Honor, we are entitled to complete our cross examination before he asks anything on redirect.

Mr. La Shelle: Your Honor, I have been interrupted in my direct examination so many times by opposing Counsel here, that it is almost pathetic; and yet, if I want to ask [266] him a couple of questions now, I can't.

Mr. Walsh: Mr. La Shelle, you have ample opportunity when we finish our cross examination. Now, you know the Rules of Evidence as well as I do. When you finish your direct examination——

Mr. La Shelle: I'll remember that in the future.

Mr. Walsh: Let me finish, please.

Mr. La Shelle: It's discretionary with the Court.

Mr. Walsh: We are entitled to finish the cross examination before you commence your redirect.

Mr. La Shelle: I am submitting it to the Court.

The Referee: As far as the Court is concerned, Mr. La Shelle, I am going to permit you to ask, as you say, on or two questions. Mr. Walsh and Mr. Fisk will have ample opportunity to complete the cross examination of this witness on November 28,

(Testimony of Walter Del Tredici.)

commencing at 11:00 A. M., and when you complete the examination of the one or two questions that you are going to ask, we will adjourn for the day.

Mr. La Shelle: Q. Mr. Tredici, I notice you wearing an ear instrument, the way I do.

A. Yes.

Q. Do you have any difficulty in hearing with that at times? A. Yes.

Q. Now, my thoughts may be wrong here, but I was under the impression that you had testified, under my direct examination, that the okay was given before the barrelling, whether [267] you accepted or rejected? A. Yes.

Mr. Fisk: Well, Your Honor, this is redirect examination, and he is putting words in the witness' mouth.

The Referee: Gentlemen, even with the answer that the witness has given, it certainly is of no help to the Court. What I want to know is, referring to the two Exhibits, one of them marked Petitioner's Exhibit Number 30 for Identification, and the other one marked Petitioner's Exhibit Number 31 for Identification, one of the documents that is a part of the Exhibit in each case is an invoice with the pencil notation, "Approved for payment, Walter Del Tredici".

Now, this witness testified that the actual invoice was not typed out and approved by him until after the whiskey was in either the oak barrel or the steel drum. Is that correct? The Witness. Yes.

Mr. Walsh: Well, Your Honor, just look at the

(Testimony of Walter Del Tredici.)

invoice. You can tell that, without even asking the witness.

The Referee: I mean, that's his testimony.

Mr. Walsh: That's right.

The Referee: I don't think there is any misunderstanding about that.

Mr. Walsh: No.

The Referee: But you also testified, in answer to the Court's question that, other than this invoice with the pencil notation, "Approved for payment, Walter Del Tredici," you had indicated prior to this time whether the whisky should [268] go into the oak barrel or the steel drum.

The Witness: Yes.

The Referee: After you made your chemical analysis; is that true? A. Yes.

Q. And did you make an instrument in writing, signifying your decision as to where it should go?

A. Yes.

Q. Do you have such a document?

A. Into wooden or steel drums.

Q. I say, do you have such a document, a copy of it? A. Yes. I don't have it with me here.

Q. But you have the document? A. Yes.

Mr. Fisk: Could he produce it?

The Referee: I think that's the answer. And both Counsel are in the clear.

Mr. La Shelle: I just wanted to clear up that point.

The Referee: You will have to return Mr. Del Tredici for cross examination and probably redirect

(Testimony of Walter Del Tredici.)

examination, so you are instructed to return on Monday, November 28, at eleven A. M., and at that time to bring with you any further written documents that you made, yourself, with reference to your decision after your chemical analysis as to where the whisky should go. Do you understand that? The Witness: Yes.

Mr. La Shelle: Have you got those?

The Witness: I turned them over to Mr. Baglin.

Mr. La Shelle: Pardon me?

The Witness: I turned them over to Mr. Baglin.

Mr. La Shelle: In other words, they should be available.

Mr. Walsh: You kept a copy.

The Witness: Yes.

Mr. La Shelle: And the original would be in their possession some place?

The Witness: Yes.

Mr. La Shelle: Now, Mr. Fisk and Mr. Walsh, is there any other information to try and facilitate the hearing that you gentlemen are requesting now of this witness?

Mr. Fisk: I would like to have him produce at the next hearing any other written documents that he made in connection with those duties there.

The Referee: You understand that?

The Witness: I missed that first part, what he said.

The Referee: If you have any written documents pertaining to your duties at Hedgeside or Franciscan on the subject matter that is in litigation that

(Testimony of Walter Del Tredici.)

you actually made, yourself, other than the one that you said you would produce, you have them with you at that time. It will be up to Counsel on both sides to object as to whether or not they are admissible, but you have them with you.

The Witness: Yes.

Mr. La Shelle: If I may say so, that calls for a certain extent as to his opinion as to what is pertinent, [270] which is a little difficult for the witness, Your Honor.

The Referee: During the period that he was at Hedgeside and Franciscan, as a result of the contract, he said he was up there on this contract, isn't that true?

The Witness: Yes.

The Referee: All right. Now, the documents that he, himself, made, I am asking him to bring them with him. I am not saying that they are admissible. That's up to you and Counsel on the other side.

* * * * *

WALTER DEL TREDICI

having been previously sworn, resumed the witness stand.

The Referee: And let the record show that the Trustee has returned Exhibits Numbers 1 to 5. You may proceed, gentlemen.

Further Cross Examination

Mr. Fisk: Mr. Del Tredici, I believe at the close of the last session you had testified that you had proved—you testified in substance you had sent—can you hear me?

(Testimony of Walter Del Tredici.)

A. That's better now, when you raise your voice.

Mr. La Shelle: I might state, Mr. Fisk, Walter is a little deafer than I am.

Mr. Fisk: If you can't understand me, say so; I will welcome the interruption. At the last session, you testified in substance that you had—under the two production contracts that Schenley had with Franciscan and Hedgeside, you were located up at the Hedgeside plant, and that samples were given you each day, and you examined those samples, and you determined whether or not in your opinion the production was suitable for beverage purposes or redistillation, and that you were given by the receptionist at Hedgeside an invoice for the [274] production, and that you wrote in pencil, "Approved" or "Disapproved," on that invoice, and I believe that that invoice was in several copies. And you turned some of the copies over to your employer, and then some of the copies remained with Hedgeside. Now, you then testified that in answer to the question as to whether or not there were any written records that you had in your possession, that there were regarding your findings, that you would produce them this morning, and have you produced them? A. Yes sir.

Q. May I see them?

A. These are my written records. One is for Hedgeside, and the other one is Mountain View Distilleries.

Mr. La Shelle: Let the record show, Your Honor, that Mountain View is Franciscan. That's

(Testimony of Walter Del Tredici.)

the name under which the distillery was registered with the A. T. U., so that we can use the word Mountain View when it means Franciscan.

The Referee: Very well.

Mr. Fisk: Your Honor, pardon me while I look at this.

The Referee: Surely.

Mr. Fisk: Q. Mr. Del Tredici, the record that you have just handed me—file, purporting to be record made in connection with Hedgeside Distillery production, and one with respect to Mountain View, I note they are simply longhand pencil memos and they are just personal records that you made for your own use, or did you make them as a permanent record in [275] connection with the operations you were carrying on?

A. I made them as a permanent record.

Mr. La Shelle: May I suggest, Your Honor, just simply for the sake of the record, that those be marked for Identification, as long as they are being used?

Mr. Fisk: I have no objection.

The Referee: The folder containing the memos, with the heading on the folder “Analysis of spirits grain production by Hedgeside Distillery Corporation, Folder No. 2”, covers spirits now stored at I.R.B.W. Number 2, Napa, Petitioner’s Exhibit Number 32 for Identification.

And the folder, with the same identification, with the exception “Mountain View Distillery, Petitioner’s Exhibit Number 33 for Identification”.

(Testimony of Walter Del Tredici.)

Mr. Fisk: Q. These two folders, Petitioner's Exhibit Number 32 and 33 for Identification, they were made by you recently, were they not, the folders, themselves?

A. Yes, I just got them together recently.

Q. This folder was set up since the last hearing?

A. That is right.

Q. But the memos enclosed in the folder were made up at the time you made the inspection, is that right? A. Yes.

Q. Look at the top sheet on folder number 2, the top memorandum in that folder, which is headed October 25, 1947, and tell me what there is on that memorandum from which you can identify [276] the statements there as having been made in connection with Hedgeside production?

A. Oh, you mean this sheet here?

Q. Yes, the first sheet, which is headed October 29, 1947; what is there on that sheet which makes you recall that as referring to Hedgeside production?

A. Well, in this particular case, when I first started in here, I didn't put down the name of the producers, but I can identify it as Hedgeside production by the barrels, serial numbers—68747.

Q. That's your only method of identifying it, is that right? A. Yes.

Q. Now, I notice that is written on with a little different pencil. Was that notation made at the same time?

A. Well, I would like to explain this system of

(Testimony of Walter Del Tredici.)

approval that I did up at Mountain View and at Hedgeside.

Q. Well, first answer the question, then explain it.

A. Well, before I can explain it, I will have to go back and review, because I think there is a certain amount of confusion.

Q. Well, just a minute, did you get the last question? A. Yes, I did.

Q. Well, could you answer that question; was that made at the same time? A. No——

Q. It was not? A. This original——

The Referee: Mr. Del Tredici, Mr. Fisk wants to know [277] whether or not it was made at the same time. Then you can explain.

The Witness: Well, no. I made this after it was barrelled down. I got this information——

Mr. Fisk: Q. Is that the body of it, which appears to be in a dark pencil; when was that written by you?

A. October 25, 1947, this dark part of the approval.

Q. 25 or 29? A. That says "25".

Q. Then, the pencil notation down in the lower lefthand corner, which contains the serial numbers, when was that written, according to your recollection?

A. I can't tell you right now. It could be on the same day, or maybe they barrelled it the following day after this approval.

Q. It was made subsequent——

(Testimony of Walter Del Tredici.)

Mr. La Shelle: Just a moment; the witness wanted to explain something with reference to that. He was told to explain it after he answered the question. I think he now has a right to give that explanation.

Mr. Fisk: All right.

The Witness: I would like to explain the whole—well, my first approval was when I received the samples, and I made a test, and then the approval was to earmark that production according to the sample, whether it should go into wooden or steel. Then, after it was barrelled down, the invoice was made out, which I approved, and that approval, the second approval, was merely a ratification of the original earmarking [278] of the production.

Mr. Fisk: Q. Now, when you speak of the second approval, what approval do you have reference to?

A. To the invoice that was prepared.

Q. What is the first approval?

A. The earmarking of the production, telling Hedgeside or Franciscan what to do with that production—into wood or steel.

Q. Well, you used the term “earmarking”. How do you earmark the production? Just mechanically, what do you do to earmark it?

A. Just tell them what type of containers to put that product into.

Q. In other words, a sample was handed you and you examined the sample and you determined from the examination of the sample whether it was to be

(Testimony of Walter Del Tredici.)

used for beverage purposes or redistillation, and you so advised an employee of Hedgeside, is that right? A. Yes.

Q. And that's all you did until you later approved the invoice, is that right?

A. Later approved the invoice.

Q. And that's what you mean by "earmarking"?

A. Yes, sir.

Q. Well, now, turn to the second memo sheet in this folder, Petitioner's 31.

The Referee: 32.

Mr. Fisk: 32, excuse me.

Q. What is there on that sheet, from which you can identify it as Hedgeside production? [279]

A. Well, I identified it by the lot number, which I assigned. It happened to be lot 105—on lot 105 on the approval.

Q. Where did the designation lot 105 come from? Is that Schenley's designation?

A. Hedgeside's designation. We used it merely as a matter of identification.

Q. Hedgeside, when they handed you a sample, they identified it as lot 105, is that correct?

A. Yes.

Q. That was written on the sample, I take it?

A. Not at all times, though. It so happened that I knew the continuity of the lot numbers, so if they left it off the bottle, I knew that it was lot number so-and-so.

Q. Does the continuity of the lot number have

(Testimony of Walter Del Tredici.)

reference to dealings with Schenley only, or all production of Hedgeside?

A. Well, I'm only interested where it dealt with Schenley's product.

Q. So the lot numbers were lot numbers that Hedgeside used in conjunction with Schenley transactions only?

A. All I know is that we used the lot numbers with the Schenley goods. I don't know what they did with the other lot numbers if they had any.

Q. Well, Mr. Del Tredici, you have said that sometimes the sample had one lot number on it, but you placed the next consecutive number in order. Now, having to do with all of the customers of Hedgeside, how did you know what the next in order would be?

A. I merely asked the Superintendent. [280]

Q. Then, you want to change your statement that you changed the numbers, is that right?

A. Don't you understand, Mr. Fisk, when you are stationed at a distillery, you are more or less familiar with the operation, and it's a continuous production and as each lot is being produced we just get a number right following each other.

Q. Well, in other words, during this period you were there, Schenley bought all of the production of Hedgeside and Franciscan, is that right?

A. That's right.

Q. Now, I noticed in the first memorandum referred to you this morning, you have a statement, "This acceptance is subject to Mr. Donnelly's and

(Testimony of Walter Del Tredici.)

Mr. Woolsey's approval". Then, I take it, your approval of these invoices was not final.

A. Only in those cases where the product did not meet the contract standard, I was able to exercise judgment on some lots that were on the borderline cases.

Q. But there had to be a further approval and acceptance by Hedgeside before Hedgeside would accept the production under their contract.

(Witness nods negatively.)

Mr. La Shelle: I'll object to that question as calling for the conclusion of the witness as to the conclusion of a contract.

The Referee: You can reframe the question, Mr. Fisk.

Mr. Fisk: Q. What do you mean by the statement you [281] have written on your memorandum, "This acceptance is subject to Mr. Donnelly's and Mr. Woolsey's approval"?

A. I meant by that, that I okayed the production and a sample was sent to our San Francisco office, where Mr. Donnelly tested it, and if he disagreed with my findings he could then override my approval.

Q. I see. And that was the understanding——

A. That was the understanding.

Q. (Continuing): ——between the parties. As a matter of fact, Schenley did throw out some of this that you had accepted, did it not?

A. Well, I don't know. Later on—they didn't tell me what they did afterwards.

(Testimony of Walter Del Tredici.)

Q. Now, is it your recollection that during the period that you have testified to here, when you were up at Hedgeside——

A. Speak a little louder, please.

Q. During the period you were at Hedgeside, the lot numbers started with lot 1 and ran consecutively on up into 100 or more during that period?

A. No. We started off, I think it was lot 105, and I am not quite positive. I don't know what was the first lot number. It was a lot number given to me by Hedgeside. I don't recall which was the first lot number we used.

Q. And what was done in the case of Mountain View? Did Hedgeside give you the number there, too?

A. Hedgeside didn't give me any number for Mountain View.

Q. Well, who gave you the number? [282]

A. Mountain View gave me the number.

Q. And who——what individual?

A. Mr. Laurentzen.

Q. Mr. Laurentzen gave you the lot number in each instance where you were examining production of Hedgeside, is that right?

Mr. La Shelle: Just a moment. I will object——

The Referee: He said Mountain View.

Mr. La Shelle: ——as assuming something not in Evidence.

Mr. Fisk: Q. Mountain View, excuse me. Is that right?

A. Well, I'd like to explain, Mr. Fisk——

(Testimony of Walter Del Tredici.)

Q. Well, can you answer that question first?

A. Yes, but he did not actually give it to me. I mean, it was going to take—we were taking all their production, so each lot took the corresponding number following each other. It was automatic.

Q. Well, did you get the number from anyone else in connection with Mountain View production, from anyone other than Laurentzen?

A. No.

Q. You have no present recollection about the lot numbers themselves, except that in the case of Mountain View you got lot numbers from Laurentzen, and in the case of Hedgeside who gave you the lot numbers? A. Henry Robert.

Q. That's the only recollection you presently have in that connection? A. That's right.

Q. Now, looking at Petitioner's folder 2, and Petitioner's for [283] Identification 33, look at the top memorandum there and tell me how you know that has reference to Mountain View.

A. Well, first of all, by the serial number range. Then up here it says, "Lot 8, Mountain View".

Q. Take the next sheet.

A. This is the analysis sheet. Lot 8.

Q. In other words, in the case of Hedgeside, you have a lot number but no designation of Hedgeside. But in the case of Mountain View, you had a lot number but also a designation of Mountain View, is that right? A. No.

Q. Well, what is right?

A. In Mountain View—in Hedgeside, the first

(Testimony of Walter Del Tredici.)

few approvals, when we got organized and after we got organized I designated the producer on each and every approval.

Q. After you made out the memoranda, what did you do with them?

A. I forwarded the original to Mr. Laurentzen in the case of Franciscan, and to Mr. Robert at Hedgeside.

Q. Well, some of them appear to be originals here. Take the first one in Petitioner's 33; isn't that an original?

A. In the beginning, when we first started in, there was—everything was new, and we didn't formulate any regular procedure. In this particular case, in lot 8, probably gave verbal okay there until we got started in writing the necessary approvals, which began with lot number 11.

Q. Well, in other words, in the very beginning, they weren't [284] particularly accurate, is that right?

A. I wouldn't say they weren't particularly accurate. We knew what we were doing up there at all times.

Q. You mean, Schenley knew what it was doing?

Mr. La Shelle: I object to that question, Your Honor, upon the grounds it is argumentative.

The Referee: Yes.

Mr. Fisk: Well, I don't think it is at all. He said, "We".

The Referee: He has answered it.

Mr. Fisk: Q. Now, these two sheets of written

(Testimony of Walter Del Tredici.)

memoranda, plus the written approval you made on the invoices, are the only records you kept in connection with your work at Napa?

A. Well, I had some weekly letters. Each week I wrote a weekly letter to Mr. Baglin, listing all the approvals. This starts with October, 1947, and goes on through to May, 1948. And if you want me to explain these letters—

Q. Wait just a minute, let me look at them.

Mr. La Shelle: I think we should have those marked for Identification, Your Honor, if Counsel is going to use them.

Mr. Fisk: Well, I don't know if I am going to use them yet.

The Referee: He is going to look at them first, Mr. La Shelle. Maybe he won't use them.

Mr. Fisk: Q. The correspondence that you have just [285] handed me, a great deal of which is not correspondence, that you are the author of, there are no other records that you have in connection with your operations at Hedgeside, are there?

A. No, those are the only records I have—the weekly letters and the approvals of the production.

Q. Mr. Del Tredici, you may have covered this, but if you have, it won't hurt to go over it again. The first operation on your part—

Mr. La Shelle: I take it, you are not interested in those inter-office records.

Mr. Fisk: No.

Q. The first operation on your part at Hedgeside was to accept a sample, and I believe you said, usually in the morning? A. Yes.

(Testimony of Walter Del Tredici.)

Q. And to make a chemical analysis of it?

A. Yes.

Q. Then, that day's production went into the receiving tanks and was barrelled, and went up to the Internal Revenue Bonded Warehouse Number 2, and warehouse receipts were issued, and an invoice was made out by this receptionist of Hedge-side and turned over to you, and you marked "Approval" on it; is that correct?

Mr. La Shelle: Just a moment, Your Honor. I'll object to that question on the ground that it is compound and complex, and calls for about eight or nine different answers.

The Referee: Sustained. [286]

Mr. Fisk: Q. Well, after your chemical analysis, what happened to the production?

A. It was—after the analysis, I wrote out the approval, designating whether to put the production into wood or steel.

Q. Well, you wrote out that approval on what?

A. According to the evidence there in those folders.

Q. These little memoranda, is that right?

A. Yes.

Q. And that's the only place you made that indication? A. Yes.

Q. Then, after that, what took place?

A. Then, it was filled out in wood or steel, according to which direction I gave, and when that was finished then the invoice was prepared and which I approved.

(Testimony of Walter Del Tredici.)

Q. Just a minute. Let's take the case where the spirits or whisky or distilled materials were placed in oak barrels and gauged by the Government gauger in the cistern room. Now, where did you get your invoice with respect to that transaction?

A. From the receptionist in the Hedgeside office.

Q. And you got it after the whisky had been barrelled and placed in the warehouse, is that right?

A. Yes. May I explain—

Q. In other words, your receptionist did not know what the serial number was, or what the barrel was, until it had been placed in the barrel in the cistern room, which is in the warehouse, and then placed in the warehouse; is that right? [287]

Mr. La Shelle: Just a moment. I'll object to that question as calling for this witness' conclusion and opinion as to what Hedgeside's receptionist knew, which is locked up in her own mind, and it is also compound and complex, calling for five to ten answers.

The Referee: Sustained.

Mr. Fisk: Q. You said that usually in the morning you made your chemical analysis with respect to that production. When did you usually get the invoice?

A. Generally, Mr. Fisk, it was filled down the same day, and then I would get the invoice around 4:30 in the afternoon or 5, whichever—

Q. What do you mean by "filled down"?

A. When it's placed into oak barrels or steel drums—

(Testimony of Walter Del Tredici.)

Q. It was placed in oak barrels or steel drums during the day?

(Witness nods affirmatively.)

Q. And then the barrel was placed in the warehouse, is that correct? A. Yes.

Q. Or the steel drum, as the case may be, was placed in the warehouse? A. Yes.

Q. And when it was placed in the warehouse, a warehouse receipt was issued, is that right?

A. I had nothing to do with warehouse receipts. I know nothing about them. My job merely was to make the tests and designate the fill-down, whether it goes into wood or steel. After that, I had nothing to do with warehousing or warehouse receipts. [288]

Q. Well, in other words, you had nothing to do with the transactions, from the time you made your chemical analysis of the sample until the time you handed an invoice; is that right?

Mr. La Shelle: Just a moment, your Honor. I'll object to that question as calling for the witness' conclusion as to the part he played. He has testified as to what he did. What part he should play, is determined by the contract.

The Referee: He may answer. What did you do between the time you made your chemical analysis and the time you approved your invoice, if anything?

The Witness: Well, I saw to it that my instructions were carried out.

Mr. Fisk: Q. Well, what was it? What did you actually do?

(Testimony of Walter Del Tredici.)

A. Well, I just went to the cistern room and saw that if I told them to put into wood that it went into wood barrels, or if it was supposed to go into steel drums that it went into steel drums.

Q. In the case of Hedgeside, where was the cistern room located with respect to the Distillery?

A. It's part of the I.R.B.W. Number 2 over the hill, about 600 yards from the Distillery.

Q. And where was the chemical laboratory in which you made the chemical analysis?

A. In the Distillery.

Q. Down the hill?

A. Down the hill. [289]

Q. A quarter of a mile away from the cistern room, is that right? A. Just about.

Q. What would be a normal daily average day's production in gallons?

A. Well, that's a question that's quite difficult to answer.

Q. Well, give me an approximation.

A. It varies according to the type of material you use, and the condition of the steel——

Q. Well, take whisky.

A. I know nothing about whisky.

Q. Well, take grain spirits.

A. Well, if you want an approximate figure, it generally ran around 5,000 proof gallons.

Q. 5,000 proof gallons? A. Yes.

Q. How many gallons to a barrel or to a drum?

A. Well, we speak of wine gallons. Now, generally, about 50 wine gallons.

(Testimony of Walter Del Tredici.)

Q. About how long would it take?

Mr. La Shelle: May I interrupt a moment? Is the Court familiar with the difference between proof gallons and wine gallons?

The Referee: No.

Mr. La Shelle: Well, it's a very difficult thing sometimes to understand.

Mr. Fisk: Your Honor, he can explain that later. I don't think it's material here. [290]

The Referee: Go ahead.

Mr. Fisk: Q. How long would it take to place in barrels or drums 5,000 gallons?

A. It generally took from about six to eight hours.

Q. From six to eight hours? A. Yes.

Q. How long would it take you to make your chemical analysis?

A. Generally about an hour.

Q. So that you made your chemical analysis the first thing in the morning, and then the rest of the day you spent in the cistern room, is that correct?

A. No, I didn't spend it in the cistern room at all times.

Q. Isn't that where all the barreling took place?

A. Yes, but another function I had was order empty barrels up there, and I had to see that these barrels, so that they weren't rotted, and inspect the empty barrels to see that they were in good condition.

Q. Well, now, how did you check whether the samples you had made covered the spirits that were

(Testimony of Walter Del Tredici.)

going into these barrels and drums when you were in the cistern room?

A. I took what would be a check sample out of the cistern room.

Q. How did you do that?

A. Hedgeside had the necessary approval from A.T.U., and they secured the samples for me, and I just made a check on them to make sure that the right goods were pumped up to the cistern room.

Q. Well, you just periodically made a spot check, is that right?

A. Made a spot check, as a matter of caution.

Q. But you did not examine every gallon, every barrel of spirits that came in, and you didn't make a double check on whether or not it was the same as the sample that you had originally examined, did you?

A. Only from the tanks. I only would check the sample in the tanks, not in each barrel.

Q. Well, the tanks are located down at the Distillery?

A. Receiving tanks, yes.

Q. And those are the tanks you checked, you spot checked, is that right?

A. May I explain that a little more, Mr. Fisk?

Q. Well, will you answer the question first?

A. Yes.

Q. All right.

Mr. La Shelle: Now, give your explanation.

The Referee: Now, you can explain it.

A. Go ahead? Well, generally I would get the samples from the receiving tanks. I would make the

(Testimony of Walter Del Tredici.)

necessary tests, but at other times Hedgeside was in a hurry to push through production or to make room in their Distillery; they have limited storage space, so sometimes during the night they would complete a lot, pump it up into the cistern tank. On occasions like that I had to get my samples from the [292] cistern tank, or sometimes they would pump to lots to go into cistern tanks, so I would—

Mr. Fisk: Q. How large was the cistern tank—how many gallons approximately?

A. It was a steel tank. It ran around 15,000 wine gallons.

Q. In order to take a sample out of the cistern tank, did you have to get the Government's consent and tax pay it?

A. No. According to regulation of A.T.U., Hedgeside was allowed to take samples each day for analytical examination. Hedgeside had the necessary approval from the A.T.U. to withdraw daily samples.

Q. What about the withdrawal that you made in the cistern tank, who got that consent from the A.T.U.?

A. I didn't make that withdrawal; Hedgeside made it.

Q. So that every time you spot checked in the cistern tank, Hedgeside went up and made the withdrawal and got the consent of the Alcohol Tax Unit, is that right?

A. Hedgeside had the consent of the A.T.U. in the form of a letter, and it wasn't necessary to ask

(Testimony of Walter Del Tredici.)

their consent each time. I mean, the gaugers saw that Hedgeside had the letter of approval. That was good for——

Q. Didn't Hedgeside——

Mr. La Shelle: Just a minute, let him finish his answer.

The Referee: And that was good for what, Mr. Del Tredici? [293]

The Witness: (Continuing) ——for an indefinite period of time. It was a standing approval.

Mr. Fisk: Q. Is it necessary, under the rules and regulations of the Alcohol Tax Unit, that every time a sample is taken out by anyone that a record be made of the quantity removed, and that it be tax paid, and who removed it?

Mr. La Shelle: Your Honor, I think we are going far afield to have this witness testify as to what the A.T.U. rules apply for. He can testify as to what he knew or thought to do, according to the rules as he found them. I think we are going a little far afield.

Mr. Fisk: We are talking now about practices, Your Honor. This witness is very familiar. He has been in the liquor business for years, and the distillery business, and he knows quite a bit about what takes place around a distillery.

The Referee: Well, he can answer what he did, as far as taking the samples or what someone else did, or who took the samples. Just tell us what took place in this particular instance.

The Witness: Well, Your Honor, the Hedgeside employees always took the samples. They had the

(Testimony of Walter Del Tredici.)

approval. Schenley did not have the approval from the A.T.U. to withdraw the samples.

Mr. Fisk: Q. How many samples during the period you were at Hedgeside did you take from the cistern room?

A. I can't remember that now. [294]

Q. Well, an approximation?

A. It still is hard to answer that.

Q. Well, did you take 1,000, or did you take 10?

A. Oh, I would say approximately 150 samples.

Q. From the cistern room?

A. From the cistern room?

Q. Yes.

A. I can't tell you that. I don't remember at all now. I can't remember that.

Q. Well, as a matter of fact, you took very few, few, if any, from the cistern room, isn't that true?

A. Well, I took a number of them.

Q. But you can't recall the number?

A. No, I can't. I mean, I made no point to recall how many samples I took from the cistern tank or from the receiving tanks.

Q. Whom did you see connected with Hedgeside, for the purpose of getting a sample from the cistern tank?

A. The Superintendent, Henry Roberts.

Q. In each instance?

A. Pardon?

Q. In each instance?

A. Or his assistant. He had an assistant up there by the name of Laporì—Jules Laporì.

(Testimony of Walter Del Tredici.)

Q. And when you saw Henry Roberts, Henry Roberts would go up and get the sample from the cistern tank and turn it over to you, isn't that right?

A. No, he wouldn't take the sample himself, one of his [295] assistants or one of his boys did all the withdrawal of the samples. Mr. Roberts really was Superintendent, and he just gave the orders.

Q. Take the case where a sample was taken from the cistern tank, how did you check what barrels that sample had reference to—the contents of what barrels it had reference to?

A. I couldn't because it wasn't barreled down yet when it was in the cistern tank. It couldn't have information to any barrels at all.

Q. When you would spot check the cistern tank, would you hold up the barreling until you made your analysis?

A. Yes. I would like to explain that a little more. Sometimes, you know, in a distillery we produce lots of heads and tails, and we would have to pump it over the same pipe line that we produced the good spirits.

Mr. La Shelle: Did you say "heads and tails"?

The Referee: He means odds and ends, I assume.

The Witness: That's right, I assume. It's the beginning and end of the distillation period.

Mr. Walsh: Not odds and ends, your Honor. It is "heads and tails". That's the term that they use.

The Witness: Well, we use the same pipe line to pump up the heads and tails, and then that pipe line

(Testimony of Walter Del Tredici.)

would be contaminated, and when we follow through with more production it would often ruin a good batch that followed this head and tail, so to prevent that I made this check of the cistern tank. [296] I was put at Hedgeside to see that the spirits that I approved was in good shape when it got to the cistern tank, and on several occasions it was spoiled when it got to the cistern tank, and then I made the spirits go into steel drums instead of wooden barrels.

Mr. Fisk: Q. Now, take the case where you examined——

The Referee: Mr. Fisk, will you need a little more time?

Mr. Fisk: Just one question.

The Referee: All right.

Mr. Fisk: Q. When you spot checked the cistern tank and you found the contents not to be up to standard, what did you do?

A. I told them to put it into steel.

Q. You told them to put into steel?

A. Yes.

Q. And who did you tell to do that?

A. Mr. Robert.

Q. Then, what did you do with respect to notifying your Company?

A. Notifying my what?

Q. Your Company—Schenley.

A. It wasn't necessary to notify my Company, outside of those weekly letters indicating the ap-

(Testimony of Walter Del Tredici.)

proval of the invoices, and that contained all the necessary information.

Q. What was the purpose of your weekly letter?

A. As a matter of precaution, to make sure that those were [297] the only invoices to pay.

Q. In other words, until your weekly letter had gone through and been received by your superior with Schenley, no payment would be released by Schenley to Hedgeside, is that right?

A. No, I had nothing to do with that.

Mr. La Shelle: I will object to that question. The witness can't answer that.

Mr. Fisk: He stated the purpose of his weekly letter.

The Referee: You may answer.

The Witness: The only purpose, Mr. Baglin requested me to write these weekly letters, giving him my approval during that week, that's all I know about it.

Mr. Fisk: Q. Well, you just stated it was for the purpose of determining whether payment would be made.

A. Just—as he explained it to me, it was just a matter of caution.

Q. Caution for what?

A. I don't know.

Q. Well, as a matter of fact, you know that it was for the purpose of having Mr. Baglin determine whether or not they would accept the goods and pay for it, isn't it, isn't that true?

Mr. La Shelle: Just a moment. I will object to

(Testimony of Walter Del Tredici.)

that as calling for the witness' conclusion and opinion as to what Mr. Baglin had in mind.

The Referee: Overruled, you may answer.

The Witness: I don't know what Mr. Baglin had in mind. All I know is, he requested me to write these weekly letters, [298] giving him the approval of the invoices I made during the week.

Mr. Fisk: Q. And you wrote them?

A. I wrote them.

Mr. La Shelle: And those are the letters which were given to you, and which you gave back to the witness, that you were not interested in them.

Mr. Fisk: That's all. You can use it.

The Referee: Q. Mr. Del Tredici, I understand from the statement you made just before this last one, the last group of statements, that there were times when you in your original analysis had designated a batch to go into wood, and then after it had gone through these pipes where heads and tails had priorly gone into, that it was possible for you to direct and order it into steel, is that true?

A. That's right. I would like to explain that, because if I approved it as good spirits, go into wood and they contaminate the lot with too much fusel oil, well, Gee, I just couldn't accept it then.

Mr. Fisk: Just one question.

Q. Mr. Tredici, take a case where you in the morning analyzed whether it was fit for beverage purposes, when you examined the receiving tank and designated that it be placed in wooden barrels, it went up to the cistern tank and you spot checked

(Testimony of Walter Del Tredici.)

and determined that it was not suitable for oak barrels, and they went ahead and barreled it, anyway, in oak [299] barrels, what happened to that whisky?

Mr. La Shelle: Well, just a moment, your Honor. I'll object to that as a compound and complex question, and assuming something not in evidence.

The Referee: Ask him if that ever happened, first.

Mr. Fisk: Q. Did that ever occur?

A. Can you repeat that question? That was quite complicated.

Q. Let's take the case where you approved it in the morning, and in the afternoon you went up to check the cistern tank, and you found out it was unsuitable for beverage purposes and instructed them to put it into metal barrels instead of oak, but nevertheless they put it into oak barrels, what did Schenley do with respect to the contents of the oak barrels?

Mr. La Shelle: I make the same objection, your Honor, as assuming something not in evidence. Ask him if that ever occurred.

Mr. Fisk: Q. All right. Did that ever occur?

The Referee: Q. Did it ever happen, Mr. Del Tredici, that you had designated originally oak barrels, and then you made your spot check, and you then designated that it went into steel barrels, but prior to your making your spot check they had already started filling it into oak barrels; did that ever happen? A. No, it didn't.

Mr. La Shelle: This is a good time, your Honor.

The Referee: Two o'clock, gentlemen.

(Thereupon, the noon recess was taken.)

Afternoon Session—2:00 o'Clock p.m.

WALTER DEL TREDICI

previously sworn, resumed the witness stand, and testified further as follows:

Mr. Fisk: I have no more questions at this time.

Redirect Examination

Mr. La Shelle: Q. I notice that looking at Petitioner's Exhibit Number 32, which is the Hedgeside production, that the first bunch of notices for steel or wood, so to speak, are in longhand, and then later on they appear to be a mimeographed printed form; what was the reason for that?

A. What was the reason for what?

Q. The fact that the first number of them were in longhand, and later on you used a printed form?

A. Well, the reason for that was to save time and work, and it made a better record.

Q. I see. Now, with reference to the production of both Mountain View and Hedgeside, I want to show you Schedule "C"—Counsel, I might state for the record that those are all the Exhibits, we seem unable to find—it was introduced in the Opening Statement, so I have got an extra one here, which is exactly the same, which we could use, and on checking my record of Exhibits I find that for some reason or other, that only "A" and "B" were marked

(Testimony of Walter Del Tredici.)

for Identification, and I would like [301] to have these two marked for Identification, so that they are marked in the record.

The Referee: That has been marked "C", will be marked Petitioner's for Identification Number 34, entitled "Recapitulation of Schenley Distillers Corporation, purchases of spirits grain and whisky, carried and stored in I.R.B.W. Number 2 at Napa, California," and attached thereto are four pages entitled, "Summary of Schenley Distillers Corporation, purchases of spirits grain and whisky, produced by Franciscan Farm and Livestock Company, now carried in storage in I.R.B.W. Number 2 at Napa, California,"—refers to two pages, and the last two pages, "Summary of Schenley Distillers Corporation of spirits grain, produced by Hedge-side Distillery Corporation and now carried in storage in I.R.B.W. Number 2 at Napa, California," Petitioner's Number 34 for Identification.

Mr. La Shelle: Q. Now, referring again to Petitioner's Exhibit for Identification Number 32, and taking the first notice there, dated October 25, which Mr. Fisk asked you about, you will notice that there appears to be handwriting on there in two different pencils; one is heavy, as you have testified, and then, on the lefthand corner at the bottom is handwriting in obviously a lighter lead of pencil. Now, the lighter lead pencil down here at the bottom there, in the lower lefthand corner, is that your handwriting?

A. Yes.

(Testimony of Walter Del Tredici.)

Q. And the lighter handwriting, in which various numbers and [302] symbols appear, was that put on before or after the spirits were barrelled?

A. That handwriting was put after the spirits were barrelled.

Q. And does that handwriting, in the lighter lead, give the serial numbers of the barrels?

A. Yes.

Q. Now, since the last hearing, I requested you to check these various notices against the Schedule C, which is Petitioner's Exhibit for Identification Number 34; did you do that? A. Yes.

Q. Have you got the one that you checked with you? A. Yes.

Q. I'll show you a similar schedule for Identification in 34, in which on page 1, page 2, page 3, and page 4, there appear various red marks and crosses, and checks and crosses. Now, will you just tell the Court how you checked these notices in both Petitioner's Exhibit Number 32 for Identification, which is Mountain View—or 33, I should say, and 32 which is Hedgeside, and how you checked that against the Schedule to see if all the notices were there. A. Well, I checked—

Mr. Walsh: Just a minute, please. I am going to object to that question as incompetent, irrelevant and immaterial. The two documents speak for themselves; how he tested them is immaterial.

Mr. La Shelle: Will you talk a little louder? With my cold, I can't hear you. [303]

The Referee: Will you read that?

(Testimony of Walter Del Tredici.)

(The last statement of Mr. Walsh was read by the reporter.)

Mr. La Shelle: I think it is perfectly competent, and at the end this will all be connected up, but I can't do everything at once. In other words, in due course I will introduce supporting documents to support the schedule, don't you see, which will stand by themselves. This is done simply as an aid to the Court and Counsel to follow, and he has checked these against this (indicating), and later on I will prove that these check against the invoices, which is the same as his checking against the invoices. Do you follow me?

Mr. Fisk: Your Honor, I would like to join in Mr. Walsh's objection and make the further objection that this is not proper redirect examination. I don't want to be——

The Referee: Sustained.

Mr. La Shelle: Q. Walter, you mentioned this morning proof gallons and wine gallons. Will you just tell the Court briefly what that is—the difference?

A. The main difference is that a wine gallon is the measurement of liquid by physical volume, and the proof gallon is more or less a measurement of the alcoholic strength of the liquid, and to determine the proof gallons you always multiply the proof of the liquid, times the wine gallons; that gives you the proof gallons. I give you an example. You take fifty wine gallons [304] at 150 proof. That would be equivalent to 75 proof gallons—50 times 150.

(Testimony of Walter Del Tredici.)

Q. What would be the alcoholic content of—

The Referee: Just a minute.

Mr. Walsh: I don't get that. I am sorry, but I don't get that. 50 times 150 doesn't give you 75.

The Witness: Proof gallons—roughly speaking.

The Referee: Now, just a minute, gentlemen. Mr. Walsh, he is raising a point there. 50 times 150 give you 7500. He wants to know where you put those decimal points.

The Witness: Two places over.

The Referee: You'd better explain it in different language.

The Witness: Well—

The Referee: Did you call 100 the medium?

The Witness: That's right.

The Referee: 150 would be really 1½.

The Witness: That's right.

The Referee: Well, you haven't said that. Now, explain that again.

The Witness: 100 proof is the medium point. In other words, the wine gallon and proof gallon remain the same. Anything over 100 proof, then, the proof gallon becomes higher than the wine gallon.

Mr. Walsh: That's what I want you to state for the record. [305]

The Witness: Oh, I see. I'm sorry I didn't make that clear for you.

Mr. La Shelle: Q. Put it this way: A bottle of bond, 100 proof, how much alcohol has it got there by percentage?

(Testimony of Walter Del Tredici.)

The Referee: Q. Supposing you had 50 gallons, 100 proof, how much would you have?

A. 50 proof gallons.

Q. And if you had 150 gallons at 100 proof?

A. That's 150 proof gallons.

Mr. La Shelle: That's a point, that wine gallons and proof gallons is quite——

Mr. Fisk: Q. And if you had 100 gallons at 190 proof, how many proof gallons would you have?

A. 100 proof gallons.

Mr. La Shelle: I think that's all, Walter.

The Referee: All right. As far as Counsel on both sides are concerned, is Mr. Del Tredici excused? You are excused, Mr. Del Tredici, unless you desire—you are welcome to stay, but I mean there is no obligation.

The Witness: I appreciate that. Thank you very much.

Mr. Fisk: We don't waive the right to recall him as our witness, if we see fit.

The Referee: No. That's correct.—Off the record.

(Discussion off the record.) [306]

* * * * *

CHARLES W. EBNOTHER

previously sworn, was recalled to the witness stand, and testified further as follows: [394]

Redirect Examination

Mr. La Shelle: Q. Mr. Ebnoter, I have here a letter addressed to you, under date of June 27, on the letterhead of Schenley Distillers Corporation,

(Testimony of Charles W. Ebnother.)

signed by Mr. E. I. Johnson, Chief Auditor, which you have just handed me, and you received that letter sometime shortly after the date of the letter, did you not? A. Yes.

Q. And you have had it in your possession since that time? A. Yes.

Q. Now, so that the Court may follow what I am doing here, perhaps the Court should read the letter.

(The letter was handed to the Referee.)

Q. Now, with respect to this letter which we just referred to, dated June 27, and the enclosure which purports to be a summary of merchandise, inventories stored in I.R.B.W. Number 2 on the premises of Hedgeside Distillery Corporation, a bankrupt—

Mr. Fisk: Now, just a minute, I am going to interrupt; if Counsel is not going to offer this letter in Evidence, I object to his putting it in by reading the contents of it. Now, the letter itself is self-serving. It's hearsay as to the Bank. I'll object to its introduction on those grounds, and I will object to him reading it into the record on the same grounds.

Mr. La Shelle: I haven't even finished the question, your Honor. [395]

The Referee: You may proceed.

Mr. La Shelle: How far did we get?

(The last question was read by the reporter.)

Mr. La Shelle: Q. To finish the question, at Napa, California, as of June 15, 1949, you will note on the two pages here two columns, one called "Type of Merchandise", another one called "The Serial

(Testimony of Charles W. Ebnother.)

Numbers of Packages”, and then another column with the headed note “Quantity of Packages”. To your knowledge as Trustee in this case, are the goods as described on this sheet, consisting of two pages, located at the I.R.B.W. Number 2 of the Hedgeside Company at Napa, California?

Mr. Fisk: I renew my objection.

The Referee: Mr. Walsh?

Mr. Walsh: Now, I object to that question, if your Honor please, on the ground it is incompetent, irrelevant and immaterial, and not the proper foundation laid. There is no showing that Mr. Ebnother ever took an inventory of the property or of the distilled spirits in the bonded warehouse, and furthermore, Mr. La Shelle is trying to prove indirectly the contents of the warehouse by Mr. Ebnother, when Mr. Ebnother—it is shown by that document that Mr. Ebnother didn’t take any inventory of the property up there.

The Referee: Mr. La Shelle did not ask him if he took an inventory. He asked him whether or not those goods were located at the distillery. [396]

Mr. Walsh: Then, I’ll make this objection: that is not the best evidence.

The Referee: Objections overruled.

Mr. Fisk: Objected to as calling for the conclusion of the witness.

The Referee: Overruled.

Mr. Walsh: May I ask a question on Voir Dire?

The Referee: Surely.

Mr. Walsh: Q. Mr. Ebnother, how did you hap-

(Testimony of Charles W. Ebnother.)

pen to know the contents of the bonded warehouse up there?

Mr. La Shelle: Well, I'll object to a Voir Dire examination at this time your Honor. This witness is the Trustee. It's his duty to know what is in his possession as Trustee.

Mr. Walsh: Your Honor please, I propose to show in my cross examination that this inventory of distilled spirits and liquor was taken by Mr. Johnson and a team from Schenley's, upon order from Court: Mr. Ebnother does not know, himself, the contents of the warehouse. It is only by virtue of that inventory that was taken.

The Referee: Mr. Walsh, Mr. La Shelle has not stated who took the inventory. His question was whether or not the goods on those two attached sheets to the letter were in warehouse number 2 at Napa at the Hedgeside Distillery; is that correct?

Mr. La Shelle: That is substantially my question. [397]

Mr. Walsh: My objection is that that is not the best evidence.

The Referee: Objection overruled. Will you read Mr. La Shelle's question?

(The last question of Mr. La Shelle was read by the reporter.)

A. I checked this record against the Hedgeside records by numbers of the serial—by the serial numbers on the packages, and this list agreed with the Hedgeside record of serial numbers.

(Testimony of Charles W. Ebnother.)

Mr. Fisk: I ask that the question go out as not responsive to the question.

The Referee: So ordered. Regardless of the records, tell us about the merchandise.

A. I can't tell you about the merchandise.

Mr. La Shelle: Q. Would you say, Mr. Ebnother, that that merchandise is not located at I.R.B.W. Number 2 at Napa, California?

Mr. Walsh: Now, just a minute, if your Honor please, I am going to object to that question—

Mr. Fisk: Objected to as irrelevant, incompetent, and immaterial.

The Referee: Wait a minute, gentlemen, one at a time. Mr. Walsh.

Mr. Walsh: My objection is it is incompetent, irrelevant, and immaterial, and the witness has already answered, [398] he just could not tell you.

The Referee: Mr. Fisk?

Mr. Fisk: Same objection—irrelevant, incompetent, and immaterial.

Mr. La Shelle: This is cross examination, your Honor, and under oath this witness has made two inconsistent statements in his answer, and I intend to cross examine him on it.

Mr. Walsh: Your Honor, please, that is not a fact that he has made two inconsistent statements under oath, and I'll challenge Counsel where he has made two inconsistent statements under oath.

Mr. La Shelle: I might state, your Honor, that proof is all right, but we are approaching an absurdity. There is not a man in this room that does not know that merchandise is up there.

(Testimony of Charles W. Ebnother.)

Mr. Walsh: Your Honor, please, I ask that that statement go out, because we are trying a lawsuit here. We are not depending on Mr. La Shelle's statements.

The Referee: The objections to the last question of Mr. La Shelle are overruled.

(The last question was read by the reporter.)

Mr. Fisk: At the present time, or on that date?

Mr. La Shelle: At any time since June 15.

The Referee: 1949?

Mr. La Shelle: 1949.

The Witness: Well, your Honor, technically I don't [399] see how I can answer that, because I never have been in that warehouse to check the serial numbers on the drums or the barrels, myself, so I don't know, when you get down to that fine a point.

The Referee: All you are expected to do, Mr. Ebnother, is to answer the questions according to your knowledge. If you don't know, we expect you to say you don't know.

The Witness: I don't know.

Mr. La Shelle: Q. Mr. Ebnother, I'll show your signature here to your Answer to the Petition here; that's your signature, is it not? A. It is.

Q. And your signature was verified before a Notary Public, a Mr. Ernest O. Meyer, and the verification is shown and that's correct, is it not?

A. That is.

Q. Now, I'll direct your attention to paragraph 4 of the Petition in Reclamation, filed by Schenley. Would you just read paragraph 4 to yourself, please.

(Testimony of Charles W. Ebnother.)

Paragraph 4, your Honor, is that part of the Petition where "it is alleged by the petitioner that at the time of the filing of said Petition in Bankruptcy herein, said bankrupt had in his possession, or said Trustee now has in his possession, the following property belonging to petitioner, to-wit," which is described.

I now direct your attention to paragraph 3 of your Answer, which reads as follows: "Denies generally and specifically, each and every, all and singular, the allegations [400] contained in paragraph 4 of said Reclamation Petition".

Upon what basis did you deny, under oath, that this merchandise which I refer to in that letter by columns in two sheets were not in your possession as Trustee?

Mr. Fisk: In the first place, may I get straightened out; the last statement of Counsel says, "Look at paragraph 3 of your Answer". As I read paragraph 3, that isn't what you read. Am I right, Mr. La Shelle?

Mr. La Shelle: That's what it says here—paragraph 3, beginning on line 2, page 2.

Mr. Walsh: Of Mr. Ebnother's Answer? You better read it again.

Mr. Fisk: You didn't give me the right copy, then.

Mr. La Shelle: All I know is that it says, "Answer of Charles W. Ebnother". It may be some other one, I don't know.

The Referee: Is that the Answer to Schenley's or the Answer to Silverado?

Mr. Walsh: That's the Answer to Silverado.

(Testimony of Charles W. Ebnother.)

Mr. La Shelle: Yes, that's Silverado. I'll withdraw the question. These things are not in order.

Mr. Walsh: Well, I'll give you my copy, if you want to read something.

The Referee: Mr. La Shelle, I think it's in the other direction.

Mr. La Shelle: Oh, I think this is the right one.

Q. That's your signature and the verification to this Answer, [401] is it not? A. It is.

Q. And referring you to page 1 of your Answer to the Schenley Petition, which, strangely enough, is paragraph 3 and reads exactly the same——

Mr. Walsh: Strangely enough, it doesn't read the same, Mr. La Shelle.

Mr. La Shelle: (Reading): "Denies generally and specifically, each and every, all and singular, the allegations contained in paragraph 4 of said Reclamation Petition."

Mr. Fisk: That's paragraph 2, though, not 3.

Mr. La Shelle: Q. Now, on what basis did you deny in that paragraph 2 of your Answer that this merchandise in question, which we have been discussing, is not in your possession as Trustee?

Mr. Walsh: Just a minute, if your Honor please. I'll object to that question on the ground it is incompetent, irrelevant, and immaterial, not proper cross examination—on what basis did he make that denial? Now, if your Honor please, examine the pleadings. This is a matter of pleading. It goes to the question of law. It is highly illegal and doesn't come within the issues of this case. He is trying to

(Testimony of Charles W. Ebnother.)

impeach the witness on an allegation in a pleading. His question directed to Mr. Ebnother was, if he knew of his own knowledge were all of these particular barrels of distilled spirits and whisky contained in that warehouse. Now, obviously, Mr. Ebnother can obtain that knowledge from records contained in the Hedgeside Distillery, or he can obtain it from other sources. That's the reason why I wanted to cross examine this witness on Voir Dire, to show that the information upon which he based his denials was received from other sources. He asked if he had direct knowledge of that.

Mr. La Shelle: May it please the Court, this denial is not on lack of information and belief. It is a flat, outright denial that this property is not in his possession as a Trustee in Bankruptcy. May I point out to your Honor this: Paragraph 2 of the Answer denies the allegation of paragraph 4 of the Reclamation Petition, which reads as follows: "At the time of the filing of said Petition in Bankruptcy herein, said bankrupt had in its possession and said Trustee now has in his possession the following property belonging to Petitioner." Now, we deny that.

The Referee: Well, supposing we eliminated the clause, "the following property belonging to the Petitioner"?

Mr. Walsh: That has nothing to do with this, your Honor; that's an answer to an allegation contained in the Petition, and when they make an allegation it belongs to Schenley's, the respondent is

(Testimony of Charles W. Ebnother.)

entitled to make a direct denial of that, and he denies that this particular whisky and grain spirits belongs to Schenley.

The Referee: Objection sustained.

Mr. La Shelle: Well, may I present my thought there, your Honor? If that's the thought, then this Answer should [403] have said, "We admit that we have this in our possession as Trustee, but we deny that it is your property, or that you're entitled to it." He is denying every single word, each and every, all and singular, the allegations of our Complaint, and then, he now comes in and says, "Oh, now, I didn't mean that". What does he mean? I am entitled to know.

Mr. Walsh: Your Honor, please, that is a matter which should be taken up before the issues were tried. If there was any objection to the pleading, it should have been made prior to the time this trial commenced.

The Referee: Well, the only thing the Court is concerned about is the question that was asked of Mr. Ebnother, and he could deny in paragraph 2 that the following property belonging to the petitioner, consisting of 8,933 barrels, is now in warehouse number 2. Maybe they belong to the Trustee, maybe they belong to someone else. If the question is whether or not the 8,933 barrels were or are now under Mr. Ebnother's possession or control, he can answer that.

The objection is sustained to the other question.

Mr. Fisk: Your Honor, may I make an objec-

(Testimony of Charles W. Ebnother.)

tion? I object to the question on the further ground that Counsel in his statement—I refer to Mr. La Shelle now—as a matter of fact, that a denial by the Trustee of paragraph 4 admits that there are 8,933 barrels of spirits in his possession. It does not. It denies that there are that many barrels belonging to the [404] petitioner stored in bond at that warehouse. That is not an answer that there are such barrels there. It's silent on that subject.

The Referee: Well, that question is not before the Court at the moment. The only question before the Court is with reference to paragraph 2 of the Trustee's Answer, answering paragraph 4 of the Petition in Reclamation, and the Court has ruled.

Mr. La Shelle: Q. I'll ask you, Mr. Ebnother, beginning at line 20, page 2, of your Answer, will you read that just to yourself, from line 20 to line 32? Have you read that, Mr. Ebnother? A. Yes.

Q. Beginning on line 20, page 2, of your Answer, appears the following: (Reading):

“Wherefore, your Petitioner as such Trustee of Hedgeside Distillery Corporation, a corporation, the above-named bankrupt, prays that the Reclamation Petition of Schenley Industries, Inc., be denied, and that the legal title to the 8,933 barrels of whisky and grain spirits described in said Reclamation Petition in Exhibit A, attached thereto, in possession of the above-named bankrupt at the time of the filing of the Involuntary Petition in Bankruptcy, and now in the possession and under the control of said

(Testimony of Charles W. Ebnother.)

respondent as Trustee in Bankruptcy of the above-named bankrupt, [405] be adjudicated and your respondent as such Trustee free and clear of any and all liens and claims of every nature and description whatsoever by Schenley Industries, Inc., and the said Anglo California National Bank of San Francisco.”

Upon what basis did you state, in that part of your Answer which I just read to you, that the 8,933 barrels set forth in Exhibit A to our Petition, was in your possession as Trustee in this case?

Mr. Walsh: Now, just a minute, if your Honor please. I am going to object to that question as incompetent, irrelevant and immaterial, and not proper cross examination. Here we have a controversy between the Trustee, the Anglo Bank and Schenley Industries, Inc., as to the title and right of possession to these particular barrels of grain spirits and whisky. Now, he is trying to impeach this witness by saying that he swore to this particular Answer.

Now, we all know that an Answer is no part of a pleading—no part of a Complaint, Petition, or Answer.

The Referee: You mean, a prayer.

Mr. Walsh: The prayer is not. That’s what I mean—no part of the Petition, or a Complaint, or an Answer to a Complaint, or a Petition.

Mr. Fisk: I’ll make the same objection—that it is not impeaching the witness. [406]

The Referee: Overruled. What was the basis of

(Testimony of Charles W. Ebnother.)

your statement in the prayer of your Petition, Mr. Ebnother?

A. The records which I mentioned before.

Mr. La Shelle: Q. Now, Mr. Ebnother, isn't it a fact that on or about June 15th—I may not have the exact date, but on or about June 15th, that you went to the Hedgeside plant at Napa, in company with Mr. Johnson and some other men from the Schenley organization with respect to taking a physical inventory of the goods there? A. It is.

Q. And how long were you up there?

A. How long?

Q. Yes; more than one day, weren't you?

A. Well, we came back——

Q. Well, I mean back and forth. You commuted, so to speak?

A. I think I stayed over night at Napa.

Q. But how many days were you up there on that particular thing?

A. They were there approximately three days.

Q. And how long were you there?

A. A little over two, but I was not engaged in the actual taking of the inventory.

Q. You were there with Mr. Johnson, were you not? A. That's right.

Q. Were you there with him when he checked the serial numbers against the Government records?

A. No.

Q. You didn't do that. And isn't it a fact, Mr. Ebnother, [407] that that physical inventory was taken with your cooperation? A. Yes.

(Testimony of Charles W. Ebnother.)

Q. And isn't it a fact that the Schenley Company paid all your expenses in connection with that work they did up there on the physical inventory?

A. They did.

Mr. Fisk: Your Honor, I object to that as not binding on the Bank, irrelevant, incompetent, and immaterial.

The Referee: I don't see the materiality of that last question as to who paid Mr. Ebnother.

Mr. La Shelle: Perhaps not, but I am laying a foundation for that, your Honor.

Mr. Walsh: Just an insinuation, your Honor, please.

Mr. La Shelle: This is not evidence, but with the cooperation of the Trustee, we sent Mr. Johnson up there to make this inventory, and we had a two-man team to make it, and it was made and it was checked, one of them and another, with Mr. Ebnother.

Mr. Walsh: Are you testifying, Mr. La Shelle?

Mr. La Shelle: I am not testifying. I am just stating what I had in mind to the Court. Those men are not all available to Schenley, because they are no longer employed. Therefore, we are not in a position to prove that, in the face of all these technical objections, without going up and taking another physical inventory. And I am going to ask this Court at the proper time to instruct the Trustee to take physical inventory of that warehouse, as it is part of his duty, under [408] the law, to know as a

(Testimony of Charles W. Ebnother.)

Trustee what he has received and what he is in possession of, and he is required to know it.

And I don't propose, under the circumstances existing in this case, that Schenley is going to be put to the additional expense of making that physical inventory twice, simply because it is put to its proof on this matter.

Mr. Walsh: Are you all through, now, Mr. La Shelle? I'll have a word to say on that, so the Court will know the correct facts. If Mr. La Shelle will proceed according to the Rules of Evidence, he will not have any trouble putting in this particular line of proof that he wants to get into the record. If Mr. La Shelle will put Mr. Johnson on the stand, and who handled this entire inventory which was taken after the Court granted permission to Schenley to take this inventory, he will get his proof. But he wants Mr. Ebnother to testify to certain facts that Mr. Ebnother doesn't know anything about. Mr. Johnson and the team from Schenley's as Mr. La Shelle has already told you, went up and took the inventory. The inventory was taken under the supervision of Mr. Johnson, and Mr. Johnson is the proper witness to testify as to what took place up there, and what they found in the I.R.B.W. warehouse.

Your Honor well knows that this is a bonded warehouse under the jurisdiction of the United States Government, Bureau of Internal Revenue. And Mr. Johnson and his team went in, and after

(Testimony of Charles W. Ebnother.)

permission was secured from the Government to go [409] in there and take the inventory. And I submit he is the proper witness to testify as to what took place, and what the inventory correctly states.

The Referee: Then, let the record show further that a Petition was filed in this Court for an Order to Show Cause to permit Schenley to take an inventory, and the Trustee resisted the Petition, and it was over the Trustee's objection that the Court granted Schenley permission to go up there and take the inventory.

Now, Mr. La Shelle, I think the thing for all of us to do here is to try to get the facts and the evidence before the Court. It's true that Mr. Ebnother can testify better probably than anyone else with reference to the records of Hedgeside, and with reference to the records of the Trustee; but as far as the actual, physical inventory that was taken at Hedgeside, I think that there is a man in the courtroom and probably other people that know more about the actual——

Mr. La Shelle: Well, I certainly hope so, your Honor, and with the Court's permission I'll be glad to withdraw this witness and see if we can prove it by Mr. Johnson. I anticipate objections to his testimony, which will probably be sustained.

EARL I. JOHNSON

previously sworn, resumed the witness stand and testified as follows:

Redirect Examination

Mr. La Shelle: Q. Mr. Johnson, I think you have been previously qualified as an accountant by profession, and chief auditor for Schenley, and as a public accountant. Now, on or about June 15—I ask that this be marked for Identification, Your Honor.

The Referee: Petitioner's Number 40 in Identification is a letter addressed to Charles Ebnother by E. I. Johnson, dated June 27, 1949, and it has attached to it Exhibit A, consisting of two pages, with the title "Summary of Merchandise Inventory Stored at I.R.B.W. No. 2 in the premises of Hedge-side Distillery Corporation at Napa, California, as of June 5, 1949," Number 40 for Identification.

Mr. La Shelle: Do you want to go straight through, or do you want to give the young lady a little rest?

The Referee: We'll take a little rest. It's five after three.

(A brief recess was taken.) [411]

After Recess

Mr. La Shelle: Q. Mr. Johnson, you went to Napa on or about June 15, for the purpose of making a physical inventory of the goods at I.R.B.W. Number 2 in Napa? A. That's right.

Q. And I show you Petitioner's Exhibit Num-

(Testimony of Earl I. Johnson.)

ber 40 for Identification. Is that the letter you wrote Mr. Ebnother and the enclosure mentioned?

A. Yes, it is.

Q. And how long were you there on that job?

A. Four days.

Q. And what assistance, if any, did you have in making the physical inventory?

A. I had four men working under by direct supervision, that were teamed up, two men each to a team, one man calling the serial numbers on each container up there, and the other man checking and listing the serial numbers.

Q. And by two-men teams, I take it that you worked independently of each other?

A. The two teams worked independently, yes.

Q. And were they up there for approximately four days with you?

A. They were up there for three full days, taking the inventory.

Q. And the enclosure to this letter, which is referred to in your letter as Exhibit A, is part of Petitioner's Exhibit Number 40 for Identification; did you make that up from the inventory data that these two-men teams gave you? [412]

A. I did.

Q. And with reference to the serial numbers and the number of packages and the description of the spirits, did you check that against any records there—either Government or the warehouse record, itself?

A. I checked all serial numbers and quantities

(Testimony of Earl I. Johnson.)

and types of merchandise, which are shown in the first column of the Exhibit, to the Government records maintained in the A.T.U. offices on the premises of I.R.B.W. Number 2.

Q. And with reference to the barrels, did you personally check each one of those barrels, or take the data from the two-men teams?

A. I take the data principally from the two-men teams. However, occasionally, during my stay up there, I went out and saw that the men were following my instructions, and did check some of the barrels, myself. I saw that the barrels were there and certain serials.

Mr. La Shelle: I think that's all on this particular subject for which I have called this witness at this time.

Mr. Ward: May I ask him a question, Your Honor?

The Referee: Yes.

Direct Examination

Mr. Ward: Q. Mr. Johnson, when you checked the serial numbers of the barrels and the quantities in the barrels listed in Petitioner's Number 40 against the Government records of the A.T.U. at I.R.B.W. Number 2, did your figures [413] correspond with the Government records? A. Yes.

Mr. La Shelle: Well, I think that the Exhibit here purports to state in the end a total inventory, and it alleges 8,885 packages.

A. That's right.

(Testimony of Earl I. Johnson.)

Q. And does that include the total inventory of the warehouse of some barrels in addition to the 8,933?

A. That's right. The inventory was taken without reference to any—any reference as to ownership or otherwise at the time.

The Referee: Well, then, let me understand your answer, Mr. Johnson; does that include all of the packages and all of the goods in warehouse Number 2?

A. That's right.

The Referee: When I say, does that, that means Exhibit Number 40 for Identification.

A. Right. There's 8,885 packages, which covers every package of merchandise under the control of the Government gaugers in I.R.B.W. Number 2 at Napa.

The Referee: Mr. Fisk?

Cross Examination

Mr. Fisk: Q. Do you recall the exact date when you first went up there, Mr. Johnson?

A. I can tell by reference to—in fact, we went up there twice. We originally intended to take inventory on or about [414] May 31, and after they got up there we found out that the permission, in addition to having obtained permission from the A.T.U., we had to get permission from the representatives of Hedgeside, and that was not forthcoming at the time; so I returned, and finally it was two weeks later, and we got permission to go up and

(Testimony of Earl I. Johnson.)

take the final inventory on—starting on June 13; so we were up there June 13, 14, 15, and 16.

Q. And two weeks prior to that?

A. Two weeks prior to that, we went up but did not get entrance into the premises.

Q. That is, Internal Revenue Bonded Warehouse Number 2. A. That's right.

Q. But you did go on Hedgeside premises?

A. That's right.

Q. Did you make any check—

A. There was no check made at that time.

Q. —of the books or records of the corporation? A. No, not at the first visit.

Q. You didn't do anything at the time of the first visit?

A. No, all I did at that time, I found out I did not have access to the records. I held the men in abeyance, in the possibility that we might get access during the day, and had to go into town to make a telephone call into our San Francisco office, to advise the production representative that we were not able to take the inventories or do any work up there at Napa. [415]

Q. Was there a Government gauger there, present at the time of your first visit? A. Yes.

Q. Do you remember his name?

A. No, I don't.

Q. And was there a Government gauger at the time of your second visit?

A. Yes, there were several Government men.

Q. And I believe you testified that you had two

(Testimony of Earl I. Johnson.)

teams of two men each, working under your supervision? A. That's right.

Q. And that you spot checked their work?

A. That's right.

Q. In other words, you actually went into Internal Revenue Bonded Warehouse personally?

A. That's right, I did.

Q. Well, will you tell us something generally about how these packages were stored in the warehouse?

A. The packages are stored—there's a cellar and an upper floor consisting — there's two buildings, both classified as I.R.B.W. Number 2. The upper floor, I believe, are tiered six high and they're in tiers, and they vary as to depth. There may be ten to twelve barrels deep on each tier, and in the cellar I believe it's four high, with the same number of barrels or drums in depth.

Q. Some of these packages were, of course, barrels, and some of them were metal drums, is that right? A. Yes.

Q. All of the 9,000— A. 885. [416]

Q. 883 or 5? A. 5.

Q. Packages—were drums or barrels?

A. That's right.

Q. Now, let us take the oak barrels; what description was on the oak barrels, other than the barrel numbers?

A. Well, that varies to some extent. Generally, it stated the type of contents. In some instances they were potato, in some cases grain spirits, and some

(Testimony of Earl I. Johnson.)

few cases some alcohol, and in certain instances, I believe, whisky.

Q. You are talking, now, about oak barrels?

A. On the oak barrels, no; let's see. I want to recap this. The alcohol would be stored in steel containers. The oak barrels would contain either spirits, whisky, and by spirits in certain instances there were grain spirits, and in certain instances there were some fruit spirits up there, I believe. I don't recall specifically.

Q. Well, now, there was a serial number on each oak barrel, and you say an indication of the gallonage in the barrel?

A. The gallonage in the barrel, no. Generally, the barrels carry, I believe, 50 gallons, but we were not taking that. We were not interested in the liquid content of the barrels.

Q. And your inventory, then, didn't in any sense consist of an inventory of the gallonage in there?

A. No.

Q. It was simply an inventory of packages?

A. That's right.

Q. Which were either oak barrels or metal drums, and the only [417] identification you took with respect to those packages were the numbers, that is, the quantity of them, and the serial numbers appearing on them? A. That's right.

Q. Is that right?

A. That's right. However, I might add there, Mr. Fisk that those serial numbers and quantities were tied into the Government records, which specifically

(Testimony of Earl I. Johnson.)

state the classification of merchandise presumably contained in the barrels or containers.

Q. Take one of these teams of two men, how did they operate?

A. Well, that's a matter of operating procedure from an accountant's standpoint. When we make an audit in any case, if we have a two-man team working, one man actually inspects the barrels; that means in the case of I.R.B.W. Number 2, it meant climbing up on the rack, inspecting with a flash light in many instances, to ascertain what the actual serial numbers show or imprint on that barrel or container was, calling them out, the other man repeating the number so that he was sure that he got the proper serial number designated on the container, and listed that on a sheet of paper, which we had pretty well set up; we knew approximately what the ranges would be.

Q. Now, that sheet of paper would consist of your work sheets supporting this inventory; is that right?

A. That's right.

Q. And I take it, you still have those in your possession? [418]

A. I have them in my possession here in court.

Q. There are two sheets of work sheets, I take it, one for each team?

A. That's right.

Q. You didn't make any third set up—

A. No.

Q. —when you made your spot check?

A. No.

Q. Did the oak barrels have anything on them,

(Testimony of Earl I. Johnson.)

indicating whose barrels they were? A. No.

Q. And the same thing, I take it, was true on the metal drums? A. That's right.

Q. So far as this inspection is concerned, or inventory taken of your spot check, you did not note down anything else with respect to the barrels themselves, except their physical presence and the serial number on them?

A. That's all.

Q. Is there any notation about where the containers were produced on the barrels?

A. I believe there was, but we made no designation on our inventory sheets.

Q. You paid no attention. Is there any indication as to the date as to which the barrel was filled?

A. I believe that's designated on the barrel or on the container, but we did not make any note of that on our inventories.

Q. And according to your experience, is it ever the practice [419] in a case of that kind, after a barrel is once filled and placed in an Internal Bonded Warehouse, to withdraw a portion of the contents?

A. It has not been my experience. I believe it's not allowed by law, except by the Government gaugers, to take a sample. I'm not sure of that.

Q. Well, is it the practice, and is it permitted by the A.T.U., to go in and buy one-half of the contents of a barrel and withdraw it and tax pay it?

A. I don't know.

Mr. La Shelle: Just a moment, Your Honor, I'll

(Testimony of Earl I. Johnson.)

object to that as a matter of law, and not a matter of evidence by this witness.

The Referee: Sustained.

Mr. Walsh: I didn't hear, Your Honor.

The Referee: Sustained.

Mr. Fisk: Q. You heard Mr. Woolsey testify this morning? A. Yes.

Q. Schenley has in its possession warehouses or storage houses with spirits stored in bulk; did you ever withdraw—did Schenley ever withdraw a portion of the containers, of one barrel?

A. To the best of my knowledge, no.

Q. Now, after each of these two teams complete their work sheets, they then took them out and checked them against the Government records, you say? A. I did that personally. [420]

Q. You did that personally? A. Yes sir.

Q. You checked those work sheets against all Government records?

A. I would have—I believe it's form 1520, designated as for 1520 on the Government premises up there. I'm not sure as to the form number. It's the record which the Government keeps, showing what is on hand under their control at I.R.B.W. at any given time.

Q. Well, I ask that the portion of the answer go out—"under their control at any given time"—as the conclusion of the witness. I ask it, because of Mr. La Shelle's insistence that this witness knows nothing about what is under the control of the A.T.U. or what its requirements and duties are.

(Testimony of Earl I. Johnson.)

The Referee: That portion may go out.

Mr. Fisk: Q. Where was the Government record kept that you checked?

A. It's in the A.T.U. offices connected with the I.R.B.W. Number 2, in Napa.

Q. Physically connected with it? A. Yes.

Q. In the same building?

A. There are two buildings; the offices themselves are segregated from the building by partitions. You can't go into the I.R.B.W. through the office. The office is separate from it. But it may be—I have forgotten now exactly whether it's part of the same building, or whether there is a partition to the building. [421]

Q. As a matter of fact, there's no connection between the two buildings at all, is there?

A. No, that's right.

Well, when I say "two buildings", there are two buildings making up I.R.B.W. Number 2; and the Government office is directly adjoining one of the two buildings, but you cannot enter either of the buildings where spirits are stored, through the offices of the Government gaugers.

Q. Was a Government gauger present?

A. Yes sir.

Q. At the time you checked his records?

A. Yes sir.

Q. And you obtained his records from him?

A. That's right.

Q. It wasn't available to you, without his being present?

(Testimony of Earl I. Johnson.)

A. That's right. They will not release those records to any outsider. They have to be in presence at all times.

Q. Now, you think it's form 1520. Have you any notation here that you can refresh your recollection on?

A. I could, yes. I've got some notes.

Q. Will you do that?

A. Yes, it is Government form 1520, Mr. Fisk.

Q. From your notation can you state what the date of the form was—1520?

A. These forms are prepared at the time—now, I don't know whether to make this on the record. Can I just qualify this [422] a minute, Your Honor?

The Referee: You can answer Mr. Fisk's question and then explain it.

The Witness: All right. As I understand it—I will put it that way, Government forms 1520 are prepared at the time of entry of spirits or whisky, or whatever the product might be, into an I.R.B.W. Number Two, into any I.R.B.W., rather; and it's my understanding that if the spirits or whisky or other merchandise in question is removed, entries to that effect are shown on the form 1520.

Again, it's my understanding that at any given time or after a given date, the forms 1520 are presumed to show a record of what is supposed to be physically in the inventory on the premises.

Mr. Fisk: Q. Are you more or less familiar with the Government form 1520?

A. I believe so, yes.

(Testimony of Earl I. Johnson.)

Q. Well, it's quite a long form, and it's got a great deal of information on it, hasn't it?

A. That's right.

Q. And the form is made out monthly or daily?

A. No, it's made out at the time of entry.

Q. In other words, when the distillery is producing, the Government gauger makes it out yearly, is that right, as goods enter the warehouse?

A. As goods enter the warehouse, that's my understanding, [423] because they show on the Government form 1520, they show the serial numbers, when it was produced, when it was shipped to the I.R.B.W., and when it was received into the I.R.B.W.

Q. Well, now, you state that the only purpose of this inventory was to make a physical check of what was present in the warehouse?

A. That's right.

Q. Why did you check it against the Government form?

A. From an accounting and auditing standpoint, we always try to tie down every possible proof of an inventory. It's one of the most important jobs that we have.

Q. Well, even if you found a barrel of spirits on the Government form, if you didn't find it physically in the warehouse, that wouldn't add to your inventory taken, would it?

A. Yes, but it would prove the other way, that if we did find it both on the inventory and on the Government form, that it gave us that much ad-

(Testimony of Earl I. Johnson.)

ditional assurance that the inventory was actually in existence, as stated.

Q. And what were your findings in this case, in that regard?

A. In all instances, our physical inventory or summary of physical inventory tied in with the Government record forms.

Q. Now, do you have any records in your notes as to the date of the Government forms that you checked against the particular barrel that you found on the premises?

A. I knew that on the Government form we showed—I took off a summary of the date as to when the merchandise which [423-429] was in the inventory was placed into the I.R.B.W. The Government forms which I examined, the information which I took off from the—I know the information is on the Government form 1520 showed the barrel serial numbers, the date of production, when it was shipped to I.R.B.W. Number 2, if it was from an outside source, and the date on which it was received into I.R.B.W. Number 2.

Q. Regardless of what source it was from?

A. That's right.

Q. That's all the Government form had on it, is that right?

A. That's all of the information that I felt was pertinent to my purposes.

Q. And did the Government form have anything on it as to whom the packages belonged to?

(Testimony of Earl I. Johnson.)

A. Yes. Not whom it belonged to; it shows who the producer was.

Q. In this case whether Hedgeside had produced it, or Mountain View had produced it?

A. That's right.

Q. But you didn't check that against the barrels or the drums? A. No.

Q. Now, if the Government form 1520 was made out at the time of entry, some of the spirits had been there for a good number of years?

A. That's right.

Q. And there is an entry made upon withdrawal; is that second entry made on the original form 1520, as originally made out, or is there a subsequent form 1520 in which you could tie the [430] two facts together?

A. That is something I don't recall—was there—Mr. Fisk. I know that we had received the form 1520's, pertaining to what was on hand in the I.R.B.W. Number 2, from the Government men and received all their current copies of form 1520, to which I checked the inventories taken.

Q. But you don't recall whether you had to go back and look at May 1, 1945, and then check it against everything subsequent to that time, to see if it had been withdrawn or not?

A. No, if I recall properly on this—and this is six months ago—if I recall properly, these serial numbers and the entries followed the production date, and the serial numbers followed production date, and I had already prepared my summary of

(Testimony of Earl I. Johnson.)

inventories on the basis of serial numbers, so it was a relatively easy matter to follow the serial numbers from my summary to the Government records.

Q. Did you make any check as to whether or not a copy of that form 1520 is furnished Hedgeside's offices and filed with them?

A. No, sir.

Q. Do you know that of your own knowledge?

A. No, I don't know.

Q. You didn't make any effort to find that out?

A. No, I felt satisfied that the Government records were sufficient for my purposes.

Q. Now, besides these facts that you have just testified to, what other records did you check? [431]

A. You mean while I was up on the premises?

Q. Yes.

A. I made a complete review of the records which had been previously put into Evidence, and which had been previously put in Evidence—what's the additional term—Evidence and——

Mr. La Shelle: Identification.

The Witness: —Identification, that had been presented here. The Hedgeside negotiable and non-negotiable receipt book, I made a complete review of those and took the items for which the original copy had not been cancelled and listed by serial number, the contents supposed to be covered by the Hedgeside receipts, the quantities; where Schenley's name appeared on the receipt, I took a record of that off; then I took a complete record of those

(Testimony of Earl I. Johnson.)

where the original warehouse receipts had not been turned in for cancellation.

Mr. La Shelle: If it please the Court, I put Mr. Johnson on here, just for the limited purpose of proving physical inventory. This is now—I didn't realize it—going into other phases of the case. I don't think at the present time it is proper examination.

Mr. Fisk: Your Honor, I am asking him what records he checked in connection with the taking of inventory, and I submit I am not limited to what Mr. La Shelle wants me to examine him on. I am entitled to test what he did.

Mr. La Shelle: I am going into all that on direct examination, later, Your Honor. [432]

The Referee: With the same witness?

Mr. La Shelle: Oh, yes. I mean, I put him on now, and I want to put Mr. Ebnoter back on for a few minutes. I think I just asked the Court to exercise discretion at this time as to procedure to limit cross examination to the physical inventory up there, without regard to ownership.

Mr. Fisk: Well, Your Honor, he has testified he went up and took a physical inventory, and he checked it against Government records. I am entitled to ask him if he checked it against other records, and if he did what they were.

The Referee: I am going to permit you to go on, Mr. Fisk, but I was just wondering whether or not it would change your opinion with reference to your examination at this time, had you known that

(Testimony of Earl I. Johnson.)

Mr. La Shelle was going to call him back for this and other purposes?

Mr. Fisk: Oh, yes.

The Referee: There would be no prejudice, as far as Mr. Fisk is concerned on cross examination.

Mr. La Shelle: No prejudice.

The Referee: With reference to any other records he checked, other than Government records, at the time he was there.

Mr. La Shelle: None whatsoever.

Mr. Fisk: It might to some extent, but I don't think this question would fall in that category.

The Referee: Well, I am not going to stop you.

Mr. Fisk: The witness's answer, I must say, went a little bit afield from my question. I simply asked him what other records he examined.

The Witness: All right. I can restate that. I checked and took a summary of open warehouse receipts. I also was given copies of the papers which had been prepared by a public accounting firm at a prior examination, where they had taken an inventory. The public accounting firm was Arthur Anderson and Company. They had made an examination up there of the inventory, presumably on the premises.

Mr. Fisk: Q. For whom had they made the examination, do you know? A. I don't know.

Q. Did you inquire?

A. I inquired, and was in effect told it didn't concern me.

Q. Did they turn their examination over to you?

(Testimony of Earl I. Johnson.)

A. No. No, but the papers in support of the inventory had been and were in the possession of Mr. Ebnother up there.

Mr. La Shelle: As a matter of fact, the Government was paid for that, Mr. Fisk.

Mr. Fisk: I gather it was, but I am rather interested that they turned over to Mr.—

The Witness: No, the only thing that was turned over was a record by Mr. Ebnother of the total number of barrels, which were supposed to be on the premises up there at that time. [434]

Mr. Fisk: Q. As a matter of fact, they are your regular accountants, are they not?

A. That's right.

Q. Might I see your work sheet, which you are refreshing your recollection from?

A. Yes. Let's see, I referred to where I had taken the summary of Government records. I trust this is all right with you, Kirk. Your Honor—

The Referee: You are well represented by Counsel, Mr. Johnson. They will protect you when you get in the clinches.

The Witness: I have a lot of papers in here, some pertaining to—I forgot to go back here. Usually I have these scheduled up, so that I can refer right to them, but I have them resorted by—resorted them so many times to get the schedules prepared. This is the summary I have taken off from the form 1520.

(Discussion off the record.)

Mr. Fisk: Q. Are the three work sheets that

(Testimony of Earl I. Johnson.)

you have there the only sheets that were made in connection with that inventory—the only records anywhere?

A. Oh, no, this is the record back here of the inventory records which were prepared as we took the inventory.

Q. Well, what was the one you just showed me?

A. That was from the Government 1520 records, which I took off myself. This was the record which was prepared at the time when the inventories were taken at I.R.B.W. Number 2, [435] showing the serial numbers.

Q. These four men—Buxton, Safer, Black, and Canale—made up the two teams?

A. That is right.

Q. Well, now the printed form that you have shown me, with 1, 2, 3, 4, 5, 6 columns that represents the recording that these men who physically made the inventory set up—is that correct?

A. That's right.

Q. Explain to me how that works on that column to the left. I see a figure, number 59-W-801. What does that indicate?

A. Well, the 801 is key number, that is the serial number, and the thing that we went by—I mean, 54 or 59; W was additional information which the men put down as they went along. The 801 is the beginning of the range of the serial numbers shown on this sheet, and wherever we have a check it designates that there was a barrel having that number on it, 801—I haven't referred to these in some time.

(Testimony of Earl I. Johnson.)

Well, the 801, 802, 803, and so forth, this sheet is set up for convenience purposes, so that we did not have to keep writing where there was 800 series, we would not have to keep writing the "8", so 801 there, when it goes to 810, we still eliminate the "8". It just goes right on up in serial numbers.

Q. Was this check that you made on June 13 to 15 the first inventory of that character Schenley had ever made of Internal Revenue Bonded Warehouse Number 2?

A. Of Internal Revenue Bonded Warehouse Number 2, under my [436] supervision, yes. I believe that's—

Q. Is that the first one that you know of?

A. It's the first one I know of, yes.

Q. Didn't you previously testify in this case that, as auditor or accountant in this area, that you made a check of once a month? A. No.

Q. You did not? A. No sir.

Q. And you acted as travelling auditor in this area, do you not? A. That's right.

Q. Don't you make a periodic check of the warehouses?

A. Where warehouses are owned by outsiders, outside of Schenley itself, the normal operating procedure on that, when it's an Internal Revenue Bonded Warehouse, is that we have outside auditors come in at least once a year, and sometimes more often, depending on S.E.C. requirement, and one procedure is to have a confirmation receipt of the contents of the I.R.B.W. from the custodian.

(Testimony of Earl I. Johnson.)

That acts as a certification of the inventories in that warehouse. Where it's our own warehouses and operated by Schenley and the Government man in conjunction, we do take the inventories.

Q. I have asked you this question once, but I want to be sure that I understood your answer. The only check that you made at this time, that is, June 13 to 15, was with respect to the number of barrels and drums of spirits and whisky and the serial numbers of them; is that right?

A. As far as the physical check is concerned, yes. [437]

Q. And that's all that was done at that time by you or any of the four men under you?

A. Now, I want to make sure that I understand that question.

Q. I want you to.

A. Would you read that?

(The last question and answer were read by the reporter.)

The Witness: I did certain things in addition to taking a physical inventory while I was up there in the premises. I believe I brought that out when I said I made an examination of the warehouse receipt books and the Government record, and so forth.

Q. But the check was limited, then, to the check in Internal Revenue Bonded Warehouse Number 2. You did nothing but check the physical existence of the barrels and drums and the serial numbers?

A. That's right.

(Testimony of Earl I. Johnson.)

Q. You didn't go into ownership or anything of that kind? A. No sir.

Q. Nor did any of the four men under you?

A. No.

Mr. Fisk: That's all I have at this time.

The Referee: Mr. Walsh?

Mr. Walsh: It's four o'clock, Your Honor.

Mr. La Shelle: We were a little late starting this morning. I have just a couple of things that I would like to take up, if I may go ahead.

The Referee: Same witness? [438]

Mr. La Shelle: Yes.

Mr. Fisk: Just a minute. I have no objection in this instance, but I don't think that Counsel should put a witness on the stand and have him bring out two or three facts, and then have him cross examined, and then bring him out again two or three more facts and have him cross examined, and on, and on, and on. After all, I think we are entitled to have the witness get on the stand and testify and have our cross examination, all in one scoop, and not have it pieced up, so that the witness as he goes along, he has as much benefit of, or has the full benefit of any cross examination. It will be highly ineffective, I would say.

The Referee: Well, Mr. Ebnoter was excused because of certain objections made to his knowledge with respect to the inventory at Hedgeside. Mr. Johnson was placed on the stand as being a better witness with respect to the actual inventory of the goods at Hedgeside, and that is the only reason

(Testimony of Earl I. Johnson.)

that Mr. Johnson is on the stand at the present time.

Now, Mr. La Shelle, if these few remaining questions that you mentioned pertain to the physical inventory, you may ask him. If they do not, then we will——

Mr. La Shelle: I understand that. Your Honor, at this time petitioner offers in Evidence Petitioner's Exhibit Number 40, for the express purpose of establishing in this case that the merchandise referred to in Exhibit A of [439] petitioner's Petition is located at I.R.B.W. Number 2, Napa, California.

Mr. Fisk: And I want to object to it on the ground it is irrelevant, incompetent and immaterial. It calls for hearsay in Evidence, as far as the Bank is concerned, and it is self-serving.

The Referee: Mr. Walsh?

Mr. Walsh: Well, I make the same objection, and I am going to make further objection that there has been no proof or foundation laid to show that the contents of the barrels—in other words, following Mr. La Shelle's very loud statement that he is going to require the Trustee to prepare and file an inventory of this distilled spirits and liquor,—I might state that there is no showing of what are the contents of these barrels, and is every barrel—does every barrel contain the full number of gallons?

Mr. La Shelle: If it please the Court, I would like to make this comment. It is true,—and I'll ask you if I may, before I develop this one question:

(Testimony of Earl I. Johnson.)

Q. Are the four men of the two-man teams available now?

The Witness: No.

Q. All four of them?

A. No sir, there is one not available.

Mr. La Shelle: All right, now, Your Honor. It is apparent that the Trustee, himself, has stated in his prayer, as Your Honor read the other day that this merchandise was [440] in his possession. Counsel for the Bank has stated here today that Arthur Anderson has made a physical inventory up there.

Mr. Fisk: I haven't stated any such thing. You ought to make your statements, if you are going to make them, reasonably accurate.

Mr. La Shelle: Well, I'll leave that to the Court's——

Mr. Fisk: Leave it to the record.

Mr. La Shelle: Leave it to the record as to whether that's true or not.

The Referee: Submitted?

Mr. La Shelle: I would like to add this, if I may, Your Honor. We have 9,000 barrels, approximately, of spirits, that are just floating around the country. Nobody knows where they are. We went up there in June, in cooperation with the Trustee, in the best of faith, to make a physical inventory. We paid all of the Trustee's expenses in connection therewith, according to his own admission. It is an important phase of this case for this Court to determine whether or not this merchandise in dispute is in possession of the Trustee, because if it is, the

(Testimony of Earl I. Johnson.)

Court has summary jurisdiction. If it isn't, the Court does not have summary jurisdiction.

Now, I ask, therefore, that unless the parties, the Bank and the Trustee, will here and now stipulate that the goods mentioned in Exhibit A of our petition are in the [441] possession of the Trustee, on the ground that the Trustee's duty is to know it's in his possession, I ask at this time that an order of this Court, instructing the Trustee to make a physical inventory and return it into court as competent proof, so that the Court will know whether or not it has jurisdiction of the summary proceedings, be made.

I think that Schenley has acted in the utmost good faith, and I think that the time has come for the Court to exercise its discretion to issue that order. Otherwise, we have to again make a petition to this Court for permission to go up there, because one of our four men is missing, and there is an objection made here that it is hearsay, and it is probably technically correct. I think that the time has come for the Court to exercise discretion to expedite the hearing of this case.

The Referee: Submitted?

Mr. Walsh: No, Your Honor. I make one more statement, and I hate to bore Your Honor with this statement, but in the light of Mr. La Shelle's statement, I feel I have to do it.

Now, Your Honor well knows, and Mr. La Shelle knows, something about Internal Revenue rules and regulations, and knows that the Trustee cannot take

(Testimony of Earl I. Johnson.)

a complete inventory of that liquor up there. He cannot go in and open up any of those barrels to determine whether or not each barrel contains the specified number of gallons—500, whatever [442] gallons it might be. We don't know whether those barrels contain a half a barrel, three-quarters of a barrel, or a full barrel.

Now, if it is Mr. La Shelle's contention that if the order for Reclamation is granted and the Trustee is directed to turn over to Schenley so many barrels of whisky and grain spirits, and it is found that some of those barrels only contain a half a barrel, is the Trustee liable for that? Is he required to turn over to Schenley the liquor that is missing in those barrels? These gentlemen know that some of those barrels are not completely full, and somewhere along the line there is going to be a day of reckoning as to the amount of goods that has been lost, and somebody has to pay for that. And that is the reason the Trustee or no one else can go in there and take a complete physical inventory of those barrels, to determine just how many gallons are contained in each barrel, because the Government won't let them.

Mr. La Shelle: May I explain that position? Perhaps the Court is not fully aware of original gauge; but when they're put into barrels, the Government gauger takes the original gauge, which I am not sure but I think is about 48½ gallons to a 50-gallon drum, something like that. They can't fill them right up to the top. Then they stay that way—and I am not stating this as a matter of evidence

(Testimony of Earl I. Johnson.)

but as a matter of law—under the A.T.U. regulations [443] and representing this to be the law to the Court— Then, when they're withdrawn, then the Government gauger takes his second gauge, and unless they're withdrawn, then a determination is made as to whether there is excess outage. Under the tables employed by the A.T.U. Rules and Regulations, you are allowed a certain amount of outage due to evaporation. In other words, let us say, for four years you are allowed four gallons—I forget what the amounts are. If you have five gallons, you have got an excess outage of one gallon, and even if you have lost that one gallon, the Government nevertheless takes its tax on that missing gallon. That's what happens.

Now, as this physical inventory,—if we go up there and want the Government gauger to regauge one of these barrels, I submit, Your Honor, that that is not required in this case. We will be perfectly willing to take those barrels, and we will pay whatever taxes on them when, as, and if we are entitled to them.

The Referee: Mr. La Shelle, in the event that Schenley prevails in this Petition for Reclamation, would Schenley be willing to take the barrels, and what is in them or what might not happen to be in them? In other words, meeting Mr. Walsh's contention, supposing these particular packages, which I don't think is pertinent at the moment, but they're listed as packages. It's not listed as gallons. Supposing the package which contains a half or a quar-

(Testimony of Earl I. Johnson.)

ter of a barrel, or nothing [444] at all, but the serial number was on the barrel and the number of packages were there, and it originally had, for instance, "grape lees brandy", and Schenley prevailed, would Schenley be willing to take those barrels with the serial number on it, regardless of what was in them?

Mr. Woolsey: I have no authority to give you a final answer, but I think I know exactly what it is. We would take the barrels—there are barrels—I mean, that's our claim here—if it's gone, we have lost it. We have tried to find out what happened to it. If Mr. Stone of Hedgeside, in running a warehouse, has been negligent, or something, we would come in and file a claim and become a creditor and share under that, too.

The Referee: Wait a minute, gentlemen, is this matter submitted? With reference to Petitioner's Exhibit 40, I have objection to it. Is this submitted?

Objections overruled. Petitioner's Exhibit Number 40, formerly for Identification, is now in Evidence. Same number.

Mr. La Shelle: I take it that the state of the record and the stipulation that I have requested would be refused.

Mr. Walsh: What stipulation?

Mr. La Shelle: I asked for a stipulation from the Bank and the Trustee that the goods mentioned in Exhibit A, and set forth therein in our Petition, are in the possession of the Trustee; that is, the barrels of spirits in I.R.B.W Number 2 in question. In the absence of that stipulation, [445] for the

(Testimony of Earl I. Johnson.)

reasons heretofore stated, so that there can be no question about this question as to summary jurisdiction and possession of the goods, and on the further ground that it is the duty of the Trustee if no one is in his possession, I ask the Court to instruct or order the Trustee to conduct a physical inventory within a reasonable time, and to return that inventory with competent legal proof to this Court at one of the dates already selected for this hearing in January.

The Referee: You want the Court to order the Trustee to do that, just to decide whether or not the Court has summary jurisdiction?

Mr. La Shelle: That's one of the purposes, but I state that it is the duty of the Trustee to know what he's got in his possession.

The Referee: As far as your Petition in Reclamation is concerned, Mr. La Shelle, I'll decide right now that I have summary jurisdiction.

Mr. La Shelle: Well, the Bank may well claim on review that there is an error there.

The Referee: You are asking the Court to rule, and the Bank may claim on review that there is error if I send the Trustee up to make an inventory, too.

Mr. Walsh: Your Honor, I think that is one of the silliest requests I have ever heard made. In other words, Mr. La Shelle wants the Trustee to go up and make a physical [446] inventory, to go to the expense of doing that, for his benefit, even if we don't know whom the property belongs to. If the

(Testimony of Earl I. Johnson.)

property does not belong to the Trustee, we are not required to make that inventory.

Mr. La Shelle: In other words, the Trustee is not responsible for property in trust?

The Referee: That is not the contention, gentlemen. This Number 40 indicates certain packages that are now in Evidence; the Court is not instructing the Trustee or Counsel for the Trustee, to make a physical inventory of I.R.B. Warehouse Number 2.

Mr. Fisk: And the Bank is not stipulating. If you want this witness to testify in this Court now that he knows Arthur Anderson made such an inventory, I would like to have him say so. That's your contention, Mr. La Shelle. Do you want this witness to make that statement?

Mr. La Shelle: No, I heard you make such a statement.

Mr. Fisk: You didn't hear me make such a statement.

The Referee: This is a good time to adjourn. Gentlemen, as I understand it, there will be no hearing on the 20th, and the next hearing in the Hedge-side will be on December 22nd.

Mr. Walsh: For the purpose of the record, Your Honor, there is an original record of the Trustee now in Evidence. That is the inventory, and it is Respondent's Exhibit Number 40. I would like permission to withdraw that and have photostatic [447] copies made and return that Exhibit.

Mr. La Shelle: No objection.

The Referee: Let the record show that Mr. Walsh has taken Petitioner's Exhibit Number 40.

[448]

* * * * *

EARL JOHNSON

previously sworn, resumed the witness stand, and testified further as follows:

Further Direct Examination

Mr. La Shelle: I might mention, also, Your Honor, [563] purely just for your own convenience in following this, that the warehouse receipt numbers that I just read off, this Schedule ties into that, these are the Hedgeside receipts now outstanding and those are the corresponding Mountain View receipts which were surrendered and these issued in lieu thereof, the typewritten part in there, the purpose I don't have in mind, I don't think it serves any purpose.

Q. Now, Mr. Johnson, I'll hand you the group of Exhibits under Petitioner's Exhibit Number 30 for Identification, and as I understand it, you assembled all of those documents with the exception of the letters from Hedgeside to Schenley enclosing warehouse receipts? A. I did.

Q. And the various documents that are in that group you secured from the Schenley offices?

A. That's right.

Q. They were kept there in the regular course of business? A. Yes.

Q. Now, I don't want to take the time to go over each one of these——

(Testimony of Earl Johnson.)

Mr. Fisk: Well, just let me interrupt here a minute. I object—I ask that the last part of his answer go out, as calling for a conclusion of the witness, no foundation laid for it. The portion where he said, “kept there in the regular course of business.”

Mr. La Shelle: Well, just a moment, Your Honor—— [564]

Mr. Fisk: He said he took these documents from their files. Now, he hasn't qualified this witness. These are not, excepting some of them, all of these documents are not records kept in the regular course of business of Schenley. They aren't documentary records, such as journals and ledgers, memoranda kept by Schenley. These are documents. Some of them are at least brought in from the outside. Obviously, the witness is not qualified to give that testimony.

Mr. La Shelle: May it please the Court, at this time we ask that the objection be overruled, and further make a motion to strike the objection on this ground. Pleadings in this case disclose, beyond the question of any doubt, that the Bank is disputing title with the Petitioner of all of the merchandise which we have referred to as the Heaven Hill purchase. They have pleaded duplicate warehouse receipts covering that merchandise. As to the spirits in question, they have pleaded and claimed as 574 barrels of that, which are grouped as one Exhibit for Identification Number 43. The petitioner in its Petition has listed each one of these warehouse re-

(Testimony of Earl Johnson.)

ceipts in Exhibit A to the Petition. The Bank has not pleaded in its Answer any claim of title to those goods whatsoever, but has limited their claim of title and their dispute with Schenley over title to the Heaven Hill whisky and the 574 barrels.

Now, as I understand the situation, both the Bank and the Petitioner here can properly be classified as contingent, [565] unsecured creditors, to the extent that either one may lose in whole or in part its claim to the ownership of these goods. To that extent, when, as, and if that decision becomes final, either the Bank or Schenley, or both, as the case may be, will become contingent, unsecured creditors, as to the amount of their loss there. In that respect, it is my understanding of bankruptcy procedure and the law applicable that unsecured creditors, both the Bank and Schenley, are represented by the Trustee, and by Mr. Walsh acting for the Trustee; and as to this property, of which the Bank's only interest is as a contingent, unsecured creditor, it has no standing before the Court whatsoever.

I might illustrate that what I mean by that is that the Silverado people, who made a Petition for Reclamation, if they lose, they are interested in the Trustee getting this, because there will be more in the pot to divide among the unsecured creditors; but they have no right to come in here and conduct a cross examination and take part in a proceeding, any more than Schenley's would have a right to go into theirs as a contingent, unsecured creditor.

So for that reason, insofar as this evidence is con-

(Testimony of Earl Johnson.)

cerned, Petitioner's Exhibit Number 30 and 31, it is my contention that the only parties that are properly before this Court as to this evidence is the Petitioner on the one hand, and the Trustee on the other; and Mr. Ward here has a case which I would like him to cite to Your Honor, which I [566] understand is directly in point.

Mr. Ward: The case referred to is: *In re Tapp*, 65 Federal Supplement 171. The portion which we are citing to the Court is found on page 173, and reads as follows:

“The Referee declined to consider Petitioner's objections to the claims of the Federal Housing Administration, Montgomery Ward, Bartlett Brothers, McDonald Poultry Company, and Bush Plumbing Company. His ruling is approved.

‘A general creditor of a bankrupt has no right to contest another creditor's claim or to appeal from the refusal of the Court to disallow it, unless upon application the Trustee has refused to do so and the District Court has authorized a creditor to proceed in the Trustee's name.’ ”

Citing *Fred Reuping Leather Company versus Fort Green National Bank of Brooklyn*, 102 Federal 2nd, 372, and other cases.

Your Honor, that case seems to hold exactly what we are contending for here, that the Trustee represents all the unsecured creditors until such time as the Trustee refuses to perform some function

(Testimony of Earl Johnson.)

of his office, at which time the Petitioner may petition the Court for leave to act for the Trustee. In this case, the Petitioner was objecting to the claim of another creditor.

Mr. Walsh: What kind of a claim—unsecured?

Mr. Ward: Yes, unsecured against the assets of [567] the Estate.

Mr. Walsh: An unsecured claim, adverse interests.

Mr. Ward: As I understand the situation here, the Bank or Schenley will be in the position of an unsecured creditor, if they lose their Petition for Reclamation. It is exactly the same situation. They are represented by the Trustee.

Mr. La Shelle: I might add to that, Your Honor, that as a practical matter it is obvious that if the Bank is dividing this into roughly—I forget the exact numbers, but it's about 9000 barrels here involved—and the Bank is claiming roughly three—that isn't the exact number, but we will take that—the Bank is proceeding under the theory that their prorated share, unsecured of nine, might equal or exceed possibly their full share of 3,000 barrels.

I have no quarrel with that theory. It would be to their interest. However, the interest that is being put in here is the interest of an unsecured creditor, who is a contingent unsecured creditor; it has no interest in that. It's not claiming any part of it. The Bank was joined because we alleged that they claimed title to some of this goods. They were served, they come in and file an answer, and they said,

(Testimony of Earl Johnson.)

“Yes, we claim the Heaven Hill whisky and the 574 barrels.” But they don’t claim any of this, so they are only interested in this as a contingent unsecured creditor.

Mr. Fisk: If Your Honor please, in the first place, [568] when a petition is filed—does Your Honor object to my sitting down?

The Referee: No.

Mr. Fisk: It’s no lack of respect of the Court.

The Referee: Go right ahead.

Mr. Fisk: In paragraph 7 of this Petition, it is alleged—or paragraph 8 of the Petition:

“Your Petitioner is informed and believes and therefore represents the fact to be that Anglo California National Bank of San Francisco, number 1 Sansome Street, San Francisco, California, claims an interest in said property——”

talking about all of the property——

“—adverse to Petitioner, and is therefore a proper party to this proceeding.”

We have been through all this before. In paragraph 8 of the Bank’s Answer, the Bank answering paragraph 8 of said Petition in Reclamation, says:

“That your answering defendant claims an interest in the 8,933 barrels of whisky and grain spirits as to which Schenley Industries, Inc. seeks the surrender of by the Trustee in Bankruptcy.”

Now, it has not yet been established in this proceeding what the interest of the Anglo Bank is in

(Testimony of Earl Johnson.)

this whisky and grain spirits, and Mr. La Shelle was unwilling to stipulate what our interest was, and I don't say that we would accept [569] it, but the other day he refused. So I don't see how the Court can deny the Bank, who was brought into this proceeding under an Order to Show Cause, the right of cross examination until the defined limits of the Bank's interest in all or any of this goods has been established.

In addition to that, the Bank is a secured creditor, without question, in this proceeding. They haven't filed a Proof of Claim, but I don't think that it is necessary under the law that your Proof of Claim actually has been filed, so long as there is time left within which to file it, where the records of the bankrupt present a prima facie case of interest as a secured creditor in the proceedings.

And I submit that the case—I haven't read the case cited by Counsel—has nothing whatever to do with the proceedings that we have here.

In addition to that—and I will be glad to give the Court authorities—it is my understanding that while the Trustee in Bankruptcy represents the general creditors in a proceeding, and the general creditor may demand of the Trustee that he make a certain claim or litigate a certain matter, and if he refuses the general creditor may go ahead on his own; but those cases still don't say that the general creditor may not appear in the proceeding along with the Trustee where there is no objection on the part of the Trustee, and it is frequently done.

(Testimony of Earl Johnson.)

And, furthermore, in this case we have been ordered by [570] the Court to come into this proceeding to show cause.

Mr. La Shelle: Your Honor, please, I perhaps didn't make myself wholly clear here. I will be the last one to deny that the Bank has an interest in all 9,000 barrels. They have got a very real interest in it. The question is as to the type of interest, and whether that interest gives them the right to go into this evidence.

Now, they have pleaded in their Answer certain warehouse receipts, which duplicate approximately 3,000 barrels of this merchandise. They have not pleaded any warehouse receipts duplicating the evidence in Petitioner's Exhibit 30 and 31. So that they are claiming no title there. Now, their interest in the remaining 6,000 barrels is simply this, and I'll concede their interest. Their interest is this, that if they don't get the 3,000 they're claiming with duplicate warehouse receipts, but if this proceeding can wind up so that while they don't get it, then the Trustee gets it, then of course there is more in the Bankrupt Estate to be shared by the unsecured creditors. So naturally, they have an interest there.

Schenley has exactly the same interest in the Silverado Petition, because if Schenley is thrown into the status of an unsecured creditor, then certainly it's to Schenley's interest to have the Trustee get the Silverado brandy and merchandise, so that there will be more in the pot for Schenley. So we're vitally

(Testimony of Earl Johnson.)

interested in the Silverado proceedings. However, that [571] interest of Schenley in the Silverado Petition, and the interest of the Bank in this part of this Petition is not an interest in which they can come in, because as a contingent unsecured creditor, all unsecured creditors are represented by the Trustee and the attorney for the Trustee.

The Referee: Mr. La Shelle, the Bank, not having put their case on yet, the Court is forced to naturally be bound by the pleadings. As Mr. Fisk points out, in paragraph 8 of your Petition, you say, "the Petitioner is informed and believes and therefore represents the fact to be that Anglo California National Bank of San Francisco, and so forth, claims an interest in said property adverse to Petitioner, and is therefore a proper party to this proceeding."

And in the paragraph preceding, you mention 8,933 barrels of whisky and grain spirits.

Now, in their Answer, answering paragraph 8 of said Reclamation Petition: "Admits that your answering defendant claims an interest in the 8,933 barrels of whisky and grain spirits as to which Schenley Industries seeks the surrender of by the Trustee in Bankruptcy."

Now, how can the Court at this time tell the Bank that you don't have an interest in a portion of it, but you might have an interest in another part?

Mr. La Shelle: Because at this stage of the proceedings and under their own pleadings, if you will read further—if you will read on page 2, I

(Testimony of Earl Johnson.)

think it is—page 2 of the Bank's [572] Answer, and also on page 3 of the Bank's Answer, you will look at line 16, page 2, they set out these warehouse receipts—I forget whether that's the Heaven Hill or the 574; it doesn't make any difference,—that would be the 574. Then, on page 3, they set forth the Heaven Hill duplicate certificate and claim that their certificates are better than ours.

Now, they don't claim any duplication of any of these certificates at all. So it becomes self-evident, from their own pleadings what they have set forth, that their interest can only be as an unsecured creditor. It can't be anything else.

The Referee: Not necessarily. The mere fact that they set forth that they have the following warehouse receipts, which Schenley also claims that they have, doesn't restrict them to having an interest in the balance of this.

Mr. La Shelle: Yes, but their interest is that of an unsecured creditor.

The Referee: I don't know that yet. Maybe the Anglo Bank will come up with a catch-all security that's guaranteed everything that Hedgeside has, including the Trustee. Whether it's good or not, I can't assume what Mr. Fisk's case is going to be on behalf of the Bank, they not having had an opportunity to offer any proof, yet, and I being bound as far as they are concerned with the pleadings.

Now, definitely they say, regardless of the duplicate warehouse receipts, which I will concede as far as your statement is correct, they do also state that

(Testimony of Earl Johnson.)

they have an interest [573] in 8,933 barrels of whisky and grain spirits.

Mr. La Shelle: Yes, but that interest can only be, under the circumstances of this case, the interest of an unsecured creditor.

The Referee: I don't know that, Mr. La Shelle.

Mr. La Shelle: I mean, I submit that.

The Referee: Well, how do I know? There is no form of security, other than a warehouse receipt. I don't know what the Bank has got. They may come up with a chattel mortgage or something else.

Mr. La Shelle: Well, we will submit it, Your Honor.

Mr. Fisk: In addition to that, Your Honor, a pleading doesn't limit it to affirmative allegations of the Answer. My defense is not limited to that. It doesn't have to be, because he has put in an anticipatory pleading. In addition to that, it doesn't recite the particular barrels. You have spent a good part of this proceeding so far showing that your warehouse receipts applied to particular barrels. You haven't established, nor are you willing to stipulate, as to which of these 8,933 the Bank's warehouse receipts apply, regardless of their other interests.

And furthermore, there is just one other thing I just wanted to recall to the Court's mind. Mr. La Shelle spent two days of the Court's time here, claiming that he wants a ruling out of this Court rendering *res judicata* any interest that the Anglo Bank has got in this proceeding, and that's [574]

(Testimony of Earl Johnson.)

what he expects to get out of it. He spent two days arguing on the point. That's what he says he has insisted upon because he doesn't expect any outside suits after this proceeding is over.

The Referee: Well, gentlemen, with reference to Mr. Fisk's objection to Mr. Johnson testifying on books and records that are not the books and records of Schenley's, the objection will be sustained.

With respect to Mr. Fisk's right to object on the examination of Mr. Johnson with reference to Exhibits 30 and 31, the Court's ruling in the future will be that he has that opportunity.

Now, at the moment, the Court is not aware of the documents that Mr. Johnson has in his hand making up that Exhibit.

Mr. Walsh: Off the record—

(Discussion off the record.)

Mr. La Shelle: In the interest of time, Your Honor, may it be stipulated that I need not object to Mr. Fisk right along that it will be deemed objected to upon the grounds that I made a little while ago.

The Referee: That is on all of Mr. Johnson's testimony with reference to the Exhibits 30 and 31.

Mr. La Shelle: Yes.

The Referee: You have no objection, have you, Mr. Fisk?

Mr. Fisk: No. [575]

The Referee: Mr. Walsh?

Mr. Walsh: No, I don't.

(Testimony of Earl Johnson.)

The Referee: In other words, what he is saying now, that these objections that Mr. Fisk might make, not Mr. Walsh, just Mr. Fisk on behalf of the Bank.

Mr. La Shelle: Yes, that's right.

The Referee: It is stipulated that you have the same position all along with reference to 30 and 31.

Mr. La Shelle: And that would apply to cross examination as well.

The Referee: Your position is that the Bank has no right of cross examination——

Mr. La Shelle: My position is that the Bank has no right to participate in these proceedings, insofar as it refers to the evidence of Petitioner's Exhibit 30 and 31, and I just don't want to make the objection every time it comes up.

Mr. Walsh: Now, for me, may I have the opportunity to make the objection?

The Referee: Surely.

Mr. Walsh: Your Honor, please, I make a motion at this time that the answer go out relating to the portion of it where Mr. Johnson testified that those records kept in the usual course of business on the following grounds: First, that Mr. Johnson is not competent at this time to testify how those records were kept in the New York office. [576] My second objection is that the documents which Mr. Johnson has in his hand at the present time and is reading from are not the records of the nature which come on with the Evidenciary Rule of being kept in

(Testimony of Earl Johnson.)

the regular course of business. They're not the books of account.

Mr. La Shelle: I might suggest, we can eliminate this, as far as the Trustee is concerned, I'll withdraw the question and stipulate the answer can be stricken, and I'll prove it from a different position.

The Referee: Very well. He is withdrawing the question and answer.

Mr. Fisk: As far as the Trustee.

The Referee: As far as the Trustee is concerned, but not surrendering any of your rights, as far as the Bank is concerned.

Mr. La Shelle: That's right.

Mr. Fisk: Wait just a minute, I'm a little confused. I don't see how he can withdraw that question on the ground of that objection. I'll take care of it this way: The Bank will make the same objection as the Trustee has made, in addition to the objection the Bank has already made.

The Referee: Very well, all right.

Mr. Fisk: What is the ruling on it? He withdrew the question on that ground, as far as the Trustee is concerned, but not as far as the Bank. Therefore, I make the same objection, as far as the Bank is concerned. [577]

Mr. La Shelle: You have got your objection sustained.

Mr. Fisk: That's very true, but here is the point: Here is the witness' cross examination; he withdraws the question in order to take care of an objection, apparently on the ground that the objec-

(Testimony of Earl Johnson.)

tion is good. Not an objection made on the same ground that I have objected on. He has left the answer in which has been stricken out on my objection, but not on the other. So I'd like to make an objection on that ground, too.

The Referee: Well, then, would it clarify it for the purposes of everyone? Mr. La Shelle is withdrawing the question and answer. Now, Mr. La Shelle is going to ask another question along the examination here, and the Bank is going to make an objection, and you make the objection over again on any grounds you want. Mr. La Shelle will object to your objection, on the ground that you're not a party to Exhibit 30 and 31.

Mr. La Shelle: I think that can be covered by the stipulation, your Honor.

The Referee: Well, that is what Mr. Fisk is concerned about, because it leaves the record a little in the air. I agree with him.

Mr. Fisk: You withdraw the question and answer.

Mr. La Shelle: As far as——

The Referee: You withdraw the question and answer, as far as this proceeding is concerned at the moment, and [578] stipulate that the answer go out.

Mr. La Shelle: Yes. Now, so far as what we went over with the Bank——

Mr. Fisk: The stipulation stands.

Mr. La Shelle: The stipulation is the same.

(Testimony of Earl Johnson.)

The Referee: Very well, regardless of this question.

Mr. La Shelle: Take a warehouse receipt Number 3685, which I took off the pile of Petitioner's Exhibit 30 for Identification, and eliminating the warehouse receipt, for the moment: Attached to that warehouse receipt are what purport to be a cancelled check, a voucher, a cancelled check, an invoice from Franciscan, another cancelled check, Schenley, another voucher of Schenley, another invoice from Franciscan, another check, another voucher, another invoice, another check, another voucher, another invoice, another check, another voucher, another invoice, another cancelled check, another voucher, another invoice.

Now, referring to those documents, you took everything in this group, with the exception of the warehouse receipts—I think I am correct in stating Counsel will stop me if I am not—that these various cancelled checks here are all payable to the Anglo National Bank. Now, will you explain to the Court the method that Schenley had, their established procedure in handling purchases of this kind, where they kept the various things, and whether or not they were kept in the regular course of business?

Mr. Walsh: Now, just a minute——

Mr. Fisk: I object to that, on the ground that no proper foundation has been laid.

The Referee: That statement as to whether or not they were kept in the regular course of business, I think you need a little more testimony from

(Testimony of Earl Johnson.)

Mr. Johnson before you can ask him that. Some of these documents are kept in one Schenley office, and some are from another.

Mr. La Shelle: I thought we had already covered that, but I will withdraw the question and submit what is the established procedure.

The Referee: All right, ask him what is the established procedure.

Mr. La Shelle: Q. What is the established procedure of Schenley with reference to handling purchases, and sales of this character and the preservation of the records?

The Referee: Does this witness know?

Mr. Walsh: Just a minute——

Mr. Fisk: Where, what place?

Mr. Walsh: I am going to make the objection, the proper foundation hasn't been laid.

The Referee: Mr. La Shelle, now isn't it a fact that some of these documents are from New York?

Mr. La Shelle: I don't know. I'll have to find out from him.

The Witness: Some of them are. [580]

The Referee: Some of them are from New York.

The Witness: But not on this particular Exhibit.

The Referee: I mean through here. In this transaction, maybe not. But in this Exhibit are some of the documents from New York.

The Witness: Yes.

The Referee: Are some of them from San Francisco?

The Witness: Yes.

(Testimony of Earl I. Johnson.)

The Referee: Now, does he know what the procedure is in New York, and also in San Francisco?

Mr. La Shelle: Yes, I think——

The Referee: Let's ask him.

Mr. La Shelle: I thought we covered it the other day.

The Referee: Well, counsel here says we haven't.

Mr. La Shelle: Well, all right.

Q. Mr. Johnson, you are Chief Auditor for Schenley on the West Coast?

A. Yes, that's right.

Q. And before coming to the West Coast——

Mr. Walsh: Just a minute, Your Honor, please. I am going to object to that line of questioning as highly leading. Just ask the man what he does and what his duties consist of. Don't put words in his mouth.

The Referee: You may proceed. The objection is overruled.

Mr. La Shelle: Q. Mr. Johnson, how long have you been Chief Auditor out here on the West Coast?

A. The position of Chief Auditor since two years ago in August.

Q. And before that, were you here in some other capacity?

A. I was head of the Treasury Department of the West Coast—Whisky Division of Schenley on the West Coast.

Q. And the setup there was a change of some manner or another at that time?

A. You mean, as far as my position?

(Testimony of Earl I. Johnson.)

Mr. Walsh: Just a minute, I am going to object to that question.

The Referee: Objection sustained. Leading question, Mr. La Shelle.

Mr. La Shelle: Q. Well, when you were in the Treasury Department, how long were you in that?

A. Approximately two years.

Q. About two years. And at that time, what was the difference between your work there and your work later on as Chief Auditor.

A. At that time——

Mr. Walsh: Just a moment, if Your Honor please, I am going to object to that question. There is nothing in Evidence to show what his work was.

Mr. Fisk: In either place.

The Referee: Q. What did you do before?—Sustained.

A. You mean; as Treasurer—Treasury representative?

The Referee: Yes.

A. In charge of all of the accounting functions of the West [582] Coast Whisky Division.

The Referee: And then after you transferred to some other job?

The Witness: After I transferred over to, back as Chief Auditor of the West Coast Division. I had the responsibility of seeing that all records pertaining to accounting on the West Coast Division were kept in accordance with the Schenley business requirements.

(Testimony of Earl I. Johnson.)

The Referee: Is that whisky business or all business?

The Witness: All business.

The Referee: And what did you do before you were in the Treasury Division of Schenley and in the supervising of the accounting business?

The Witness: I was sent out from the New York office to take that function over before I came out here. I was given a grounding in all of the functions of the New York office to know what the procedures and the methods and departmental set-up was in the New York office, in maintaining the various records pertaining to their business transactions.

The Referee: How long were you in the New York office?

The Witness: Approximately a month.

The Referee: And when was that?

The Witness: In 19—the beginning of 1946.

The Referee: At the time, were you in the New York office in any other capacity, other than the month you spent there? [583]

The Witness: No sir.

The Referee: When you were being grounded in procedures and so forth?

The Witness: No.

Mr. Fisk: Q. By whom were you employed at that time?

A. You mean, the name of the party?

Q. Were you employed by Schenley at that time?

A. Yes.

(Testimony of Earl I. Johnson.)

Q. As an employee of Schenley?

A. As an employee of Schenley, yes sir.

The Referee: Gentlemen, it's twelve. Is this a good time?

(Thereupon an adjournment was taken until two o'clock p.m.) [584]

Afternoon Session—2:00 o'clock p.m.

Mr. La Shelle: Your Honor, I would like to call the Court's attention to the fact that on page 509 of the transcript that all of this testimony on procedures, both in New York and San Francisco are all entered. I'll be happy to go over it again. It's all there—probably forgotten.

Mr. Fisk: Who is this by, Johnson?

Mr. La Shelle: Yes, we had to do it to get the Heaven Hill documents in.

Mr. Walsh: There, you see, Your Honor? They have taken this man, put him on, taken him off, there has been no opportunity of cross examining.

Mr. La Shelle: He was cross examined, too.

Mr. Walsh: I did not cross examine Mr. Johnson at any time. I have never had the opportunity of cross examining Mr. Johnson.

Mr. La Shelle: You have.

Mr. Walsh: No, I haven't. You show, in that transcript, where I have asked one question on cross examination.

Mr. La Shelle: I say, you have had the opportunity.

Mr. Walsh: I have not had the opportunity. I

(Testimony of Earl I. Johnson.)

have not even had the opportunity of cross examining this other witness you had on the stand. Look at your transcript. What page did you say that is on? [585]

The Referee: 509, that's the page Mr. La Shelle has shown me. Page 509 of the transcript of December 22nd. Mr. La Shelle, I have read it very hurriedly, but how does this change the situation that existed prior to the recess at noon?

Mr. La Shelle: Well, he has given all the established procedures of Schenley in New York, San Francisco. He has done that.

Mr. Fisk: You are the one that is asking——

The Referee: Wait a minute, just a minute; I see here he is talking about the West Coast. (Reading):

“I know what is required out here on the West Coast, as far as support for payment. So that if any question comes up at any time in connection with the payment through normal operating procedure of the Company, I know what source I have to go to, to get the original support for the payments which have been made.” That's from 510.

Mr. Walsh: “Continue on.” I ask that that be stricken from the record.

The Referee: Wait a minute, Mr. Walsh. Even before that. Now, on 509: (Reading):

“A. Well, we operate on the West Coast, the Schenley Whisky Division, we operate as a branch for them, as an individual unit. In other

(Testimony of Earl I. Johnson.)

words, [586] every payment which is made subject to review by the New York office, Accounts Payable Department or clearance. Although we have people who are authorized to draw checks, and the payments will stand up based on authorizations out here on the West Coast, everything is subject to review in the New York office, so that when documents are prepared out here, the normal procedure calls for a copy of those documents, in many instances the original documents, to go to the New York office. However, the files in the Accounts Payable Department out here, which supports payments which have been made, are copies, except that they are duplicates of original information which has been cleared here and then transmitted to New York.”

Now, where is there anything in here that says anything about the witness knowing about the New York setup?

Mr. La Shelle: It's all in here. Here is where I went into testimony of the New York office, and then Mr. Walsh objected and said we were cluttering up the record about New York. It's all in there. It goes over a number of pages.

The Referee: Page 511 now. (Reading):

“Mr. La Shelle: Now, with reference to purchases made, not on the West Coast, but purchases made in New York, do you know what that procedure is as far as preserving documents? [587]

(Testimony of Earl I. Johnson.)

“A. Yes, I do.

Q. Tell us what that is.

A. I wasn't in the New York office.

And then: (Reading):

“The Referee: Just a minute, now. Without an objection; how will we be interested in the procedure in the New York office?”

Mr. La Shelle: Well, Your Honor, if I may show you here, this is number 11 for Identification. That's the original invoice of Heaven Hill, and that's the cancelled draft of Heaven Hill and Schenley, and that's the copy of the so-called 'Letter of advice', two vouchers. Then there is the cancelled draft. This was a New York transaction between Heaven Hill in Los Angeles and the New York office, and we sent to New York for these documents.

Mr. Walsh: Your Honor, please, in the interest of time and saving the record, all that Mr. La Shelle has to do is to hand the witness the document and ask him what it is and identify it. It shows on its face that it was paid by Schenley or not. That's all you are interested in.”

Mr. La Shelle: It spreads out over quite a few pages.

Mr. Walsh: Mr. La Shelle states that this is preliminary. Now, he still has this witness on the stand, and [588] he calls it preliminary, and I submit, Your Honor, that our objection is good.

The Referee: I'm still reading it.

(Testimony of Earl I. Johnson.)

Mr. La Shelle: It will be the third time he has gone into it. I'll be happy to do it again.

Mr. Fisk: We are objecting to your doing it again.

The Referee: Just a minute, now. Well, I don't see any of these following pages that is of assistance to the Court at the moment. There has been an objection now with reference to the books, records, and documents kept in the regular course of business in the New York office, and the witness on the stand, not necessarily Mr. Johnson—I haven't objected, but he stated that he didn't know anything about the New York Office. Earl Johnson.

Mr. La Shelle: Well, perhaps it will be quicker—

The Referee: Just a minute, now, so we will be in the clear.

Mr. La Shelle: Shortly before the Heaven Hill documents went into Evidence.

The Referee: Well, Earl Johnson on the stand, on page 510, he makes a statement that "I know what is required as far as support for payment." I haven't found anything in the transcript—if I can be shown, I'll be glad to change my opinion—but I don't see anything in there where Mr. Johnson states his familiarity with the New York operations. I can see what he says about New York having a check on their [589] operation out here and all those things.

Mr. La Shelle: (Indicating)

The Referee: Page 511. (Reading):

"Mr. La Shelle: Now, with reference to pur-

(Testimony of Earl Johnson.)

chases made, not on the West Coast, but purchases made in New York, do you know what that procedure is, as far as preserving documents? A. Yes, I do.

Q. Tell us what that is.

A. I wasn't in the New York office."

Mr. La Shelle: I know, but read the last of it where he finally tells you later on, on that page and the next page and page 512. I'll be glad to do it again.

The Referee: Mr. La Shelle, I am not arguing the point with you, but what are we going to do—accept the transcript, or ask the witness? He says, "I wasn't in the New York office". I mean, that's his answer.

Mr. La Shelle: I know, but he is interrupted, and there, you see: "Just a minute, now, without an objection: How will we be interested in the procedure in the New York office?"

Mr. La Shelle: Well, Your Honor, if I may show you here, this is Number 11 for Identification; that's the original invoice of Heaven Hill, and that's the cancelled draft of Heaven Hill, and that's the copy of the so-called "letter of advice", two vouchers. Then there is the cancelled draft. This was a New York transaction [590] "between Heaven Hill in Los Angeles and the New York office, and we sent to New York for these documents."

Then he went on and told about the procedure here, and they were introduced in Evidence.

The Referee: Show me about that. That's what

(Testimony of Earl Johnson.)

I want to know. He says, he wasn't in the New York office. I don't think there is anyone here that disputes the fact that some of these documents were obtained from New York and from the New York office of Schenley. The objection raised by the attorney for the Trustee and the objection raised by the attorney for the Bank is whether or not the witness on the stand is in a position to testify as to the procedure and the documents, and so forth, in the New York office.

Mr. La Shelle: Well, we'll go ahead. We don't want to argue over the record any longer. We will go ahead and develop it.

Mr. Fisk: If Your Honor please, I don't want to prolong this discussion, but it is decidedly pertinent. On page 526 of the transcript, all of this discussion that the Court has been reading resulted in a determination by the Court that this witness knew nothing except that he had taken certain documents out of the San Francisco files, and as a result of that the Court did not receive in Evidence the documents that Counsel was offering at that time, which you will find by turning to page 534, and those documents aren't yet in Evidence and on that account. [591]

Mr. La Shelle: What documents are they?

Mr. Fisk: The warehouse receipts.

Mr. La Shelle: Oh, those are the warehouse receipts. Well, I think we will move quicker if we just go ahead.

The Referee: Very well.

(Testimony of Earl Johnson.)

Mr. La Shelle: Q. Mr. Johnson, you stated that you spent a month in the New York office, as I recall it, learning procedures before you came out here? A. Yes sir.

Q. And will you tell us what your training was there with reference to the established procedures of Schenley?

A. Well, I was hired on specifically by the New York office, by the Treasurer at that time and the Chief Accounting Officer, to assume the responsibility as Treasury Representative of Whisky Division on the West Coast. Having not had any experience in Schenley's procedures prior to that time, I was required to spend approximately a month in the New York office, going throughout the various departments, going over the various procedure manuals, which generally specify what requirements pertain to various business transactions, what required supporting documents must be maintained for the Company records in order to support, for instance, payments, transactions, such as transfers, adjustment, inventories, et cetera.

And in order to carry on the function as West Coast Treasury Representative, I had to have a fundamental knowledge of all the operating departments, accounting department [592] treasury-wise in New York—

Mr. Walsh: Just a moment, Your Honor, I ask that last statement go out as a conclusion of the witness.

The Referee: So ordered.

(Testimony of Earl Johnson.)

The Witness: All right; Schenley has certain standard procedures which they require all operating units to follow——

Mr. Walsh: Just a minute, Your Honor, please, I am going to ask that answer go out as not the best evidence.

Mr. La Shelle: I state that's within the witness's knowledge.

The Referee: I will reserve my ruling with reference to that going out or not——

Mr. Walsh: Well, Your Honor, please, may I make a statement on that?

The Referee: Yes, Mr. Walsh.

Mr. Walsh: In other words, if there are certain standards or procedures, this witness's testimony is incompetent. They should produce the documentary evidence showing those record procedures. He makes a conclusion that there are certain standard procedures.

The Referee: Mr. Walsh, that's the reason the Court said that it would reserve its ruling on it, knowing that that was the basis of your objection; but at the same time, in an attempt to speed this matter up, and in the event that it's only preliminary, why, I permit it to go in. But in the event that it becomes important, as far as his testimony is concerned [593] with reference to what their standards are, then I say they're correct. They are entitled to see what the standards are.

Mr. Fisk: May I make this objection in that connection, Your Honor? I would like to make the same

(Testimony of Earl Johnson.)

objection on the ground that this witness has testified that the practices and procedures followed by the New York office are set forth in the West Coast office, too, in certain documents in possession of that Company, and that he went there for the purpose of familiarizing himself with those instruction books, so to speak.

Now I object on the grounds for him to testify as to the contents of the instruction books is not the best evidence.

The Referee: Before ruling on that, Mr. Fisk, Schenley's have a manual of accounting procedure.

The Witness: They have numerous manuals.

The Referee: They have a manual that, using the layman's language, would be the Bible for you to follow and all accountants to follow, whether they are in New York or San Francisco, isn't that true?

A. It's a highly sectionized manual which you could——

The Referee: Q. But regardless of how technical it is, they do have a manual?

A. Yes.

Q. That you must follow, and you can't deviate from it, as far as the specific things that are set forth in the manual [594] is concerned?

A. That's right.

Q. Is the manual available, or the group of manuals?

A. There's a group of manuals which are issued from time to time, and they're superseded and changed, and in connection with any other type of

(Testimony of Earl Johnson.)

transaction there may be numerous manuals, which are numerous procedures which pertain to a transaction of that nature or connected with that.

Q. Let me ask you this: Supposing you had a transaction such as we have here, where we have a group of transactions with reference to these warehouse receipts and purchasing spirits or whisky in a bonded warehouse and invoices and paying checks, and so forth and so on, where would you go to find the correct procedure to follow?

A. That's pretty difficult to say, Your Honor.

The Referee: Q. Well, if you can't answer my hypothetical question, you give me your explanation, and then I'll ask you something.

A. All right. My accounting procedures, both with Schenley and other Companies, are from an accountant's standpoint accepted procedures. The only thing that a manual in accounting procedure in Schenley, or any other audit that I know of that I have done in connection, would be to qualify certain phases of accounting procedure, if there were additional requirements. It's a standard from an accounting standpoint in order to support payment of a bill. There are certain requisites before any Company will expend their money. [595] Those types of references are not generally set forth in any manual. They're known from training and from past practice in the Company.

The Referee: Q. Well, Mr. Johnson, if you were going to testify as to what the practice was in the

(Testimony of Earl Johnson.)

Schenley office in New York, what would be the basis of your answer?

A. I would say that my training as an accountant first, supplemented by a complete review of the way in which they handled their general transactions in New York, supplemented again by procedures or procedure manuals which specify certain requirements in the event of a particular type of transaction. It would be a combination of those three things.

Mr. La Shelle: Your Honor, I would like to state that simply the purpose of this testimony is to certain established procedures of Schenley's pertaining to the New York office and also this office.

The Referee: But Mr. La Shelle, let me interrupt you. I have an objection here, whereby the objecting Trustee and the objecting respondent, Anglo Bank, are concerned about Mr. Johnson testifying as to what the procedures are in New York, number 1; and they are also objecting on the ground that Schenley has a manual that is to be followed, then they would prefer to have the manual rather than to have Mr. Johnson testify.

Mr. La Shelle: Then they would want something else. What my offer of proof is, I intend to prove by this witness [596] that he knows by his own experience and training in New York office and his work out here of established procedures they have in preserving documents in supporting payments and purchases of this nature. He knows those by his own knowledge.

(Testimony of Earl Johnson.)

The Referee: Does he know more than the manual?

Mr. La Shelle: Well, as the witness has stated, Your Honor, the manual doesn't cover every phase of it. Most of it is standard accounting practices, but he knows what the Company does. Now, we have got certain documents here in the form of cancelled checks, invoices, and what-not. The purpose of this testimony is to show he knows what the established procedure is. Now, when a man knows what the established procedure is, and he knows that certain checks and invoices should be in a certain place in the Company records, he goes to that place and gets those records, and here they are.

Mr. Walsh: That's just it; he didn't get it.

Mr. La Shelle: And that follows the Business Records Act. No large company, Your Honor, could ever produce every witness that has handled every single one of those documents. I might have to have 50 or 60 witnesses from all over the country on it.

The Referee: Mr. La Shelle, that's not necessary. I mean, if you still go back to the overall objections made by the Trustee and the Respondent Anglo Bank, their original contention was that some of these Exhibits in 30 and 31 are [597] not documents that were kept in the ordinary course of business of Schenley's. That's their original objection, is that correct? Is it?

Mr. Walsh: That's the first objection, yes.

The Referee: Well, ask the gentleman.

Mr. Fisk: That's right.

(Testimony of Earl Johnson.)

The Referee: That was the original statement that they made as to how Mr. Johnson should be in a position to tell with reference to documents that are not documents in Schenley's here on the West Coast Number 1, not documents or records kept in the regular course of business.

Mr. La Shelle: Well, we are attempting to prove that they are, Your Honor. We are attempting to prove that they are kept in the regular course of business. It couldn't be anything else.

The Referee: Well, in the regular course of business in what office?

Mr. La Shelle: In the Schenley organization.

The Referee: Where?

Mr. La Shelle: Both here and New York, because the witness has testified that certain documents on a purely local transaction have to go to New York when they're closed.

The Referee: So the Respondents want to know what he knows about keeping the records and documents and the accounting procedure in New York, so they'll know whether or not these— [598]

Mr. La Shelle: That's what I am trying to develop, but I can't seem to get started.

The Referee: We'll give you another chance, Mr. La Shelle.

Mr. La Shelle: Q. Well, now, Mr. Johnson, with reference to purchase and sales in the regular course of business, purchase and sale of bulk whisky or bulk spirits, from any source whatsoever—we will take the West Coast first—a local transaction here,

(Testimony of Earl Johnson.)

if an invoice comes in from somebody that Schenley wants to purchase whisky from, will you tell the Court the established procedure that is followed here on the West Coast, and what, if anything, you sent as a result of that to New York?

A. I might be able to back into it a little better than I can on it direct.

Mr. Walsh: Your Honor, please, I am going to make this objection: In the question propounded by Mr. La Shelle there is a statement that, in the regular course of business—There is no foundation made as to what the regular course of business of Schenley's is, respecting the certain whisky transaction. We haven't that in Evidence at all.

The Referee: Well, I assume that Mr. Johnson is going to testify as to how this particular transaction on the West Coast would be handled if it was a similar situation as we have here on one transaction. Is that your question?

Mr. La Shelle: That's it. [599]

The Referee: If Mr. Walsh has made an objection, it is overruled.

Confine it to the West Coast on an individual transaction.

The Witness: On the West Coast we have, generally speaking three types of Accounts Payable transactions, where we disperse money. First and most predominantly, we have the transaction where a request for a purchase order is issued. Our Purchasing Department make contact with a vendor in order to obtain that merchandise. When the mer-

(Testimony of Earl Johnson.)

chandise is delivered, a receiving report is made up in support of that delivery. We obtain an invoice from the vendor covering that merchandise. Our Accounts Payable check the receiving report, the copy of the invoices received from the vendor, and a copy of the purchase order, to see that everything is in agreement with what was ordered in the first place. If that is found to be in order, a check is drawn, approved by the necessary approvals, which may vary on the West Coast, check is drawn and issued to the vendor in payment of that particular invoice, and the supporting documents to that are filed—let me state that all of the supporting documents, with the exception of the check, which is an original, and an only document, copies of those documents are forwarded to the New York office.

Now, in some instances, it may be copies; it may be originals in other instances, depending upon the particular transaction. So there is a complete set of documents [600] pertaining to every sale of that nature maintained in New York office for our records as well as on the West Coast. So that, just bringing it on a little further, if there should appear to be a document lost on the West Coast, I can go to the New York office and know that I can obtain a duplicate set of documents so that I can have them photostated. I know what they have and where I have to go in order to obtain them. Now, that was the first type of transaction.

Secondly, we have contractual obligations or contractual commitments which are made for the pur-

(Testimony of Earl Johnson.)

chase of materials. It may be merchandise, it may be supplies, or various and sundry, where our contracts supersede or take the place of the purchase order. In that event, we require that there be a copy of a vendor's invoice again. That is checked out—also there would be a copy of a receiving report or a document replacing the copy of the receiving report. The receiving report is generally made out if the materials are received on the premises. In lieu of that receiving report, and I can cite in this instance, in the case under question now, superseding or replacing that receiving report, would be the warehouse receipts.

In support of payment, then, in the case of a contractual obligation, we have a reference to a copy of a contract, we have a copy of the invoice issued by the vendor and a copy in this instance—it may vary, as that may be called for by contract—but in this instance, a copy of [601] the warehouse receipt. Now, the warehouse receipt in itself is an original and an only document. If the transaction——

Mr. Walsh: Just a minute, Your Honor——

Mr. Fisk: I am going to interrupt and ask that the portion of his answer go out, when he starts to state the procedure in this instance. As I understand, he is now testifying as to the West Coast practice generally on three different types of transactions, and in this——

The Referee: So ordered, Mr. Fisk.

Mr. Johnson, give us the West Coast practice generally, and you have specified that there were

(Testimony of Earl Johnson.)

three different—generally three different types of transactions, so continue with that.

The Witness: In the West Coast office——

The Referee: You just finished talking about the contractual transaction, when there was a warehouse which, in effect, would be the same as the first one when there was a check. Now, continue on.

The Witness: Off the record, Your Honor. The only thing I wanted to bring in——

Mr. Walsh: No off-the-record.

The Referee: We are on number 2. The warehouse receipt transaction, instead of the original check testimony, and we're on number 2 where there is a contract and warehouse receipt.

The Witness: Now, in our Accounts Payable Department, [602] a check is made against the contract, we obtain a copy of the vendor's invoice and a copy, or we obtain in this instance for serving the purposes——

Mr. La Shelle: Don't say, "in this instance".

The Referee: That is the point. We are just talking about hypothetical cases in the West Coast, the three kinds.

The Witness: If I eliminate the term, "Accounts Payable Department", then I mean in our West Coast office, then——

The Referee: The thing we don't want you to do, Mr. Johnson, is to specify that any one of these three particularly applies to the case that is now under discussion. Just tell us generally the three types of transactions that you have. One, where the

(Testimony of Earl I. Johnson.)

vendor sells so-and-so, and it's paid by check; number two, where there is a contract—see, eventually there is a warehouse receipt—

Mr. La Shelle: If I may make this suggestion, when you want to refer back, instead of saying “in this instance”, say “in such instance”.

The Referee: Yes.

The Witness: Well, in such instances, either a warehouse receipt or some similar document would be used as support, as final support of any payment made under contractual obligation. The third type of transaction—I don't think we will be affected by it here, but to bring it out, we have letter forms of contracts, which are agreements between parties, they're [603] not entered into as a formal contract, where you have officers of the Company, and so forth, involved; but they are agreements generally for services, or, for instance, we have services taking care of our typewriters, and so forth, which are entered in by Department heads, and so forth, on the West Coast, that go into by letter agreement, and in those instances we require that we have some form of letter agreement. We have a copy of the vendor's invoice, and when the services are performed or supplies received, and so forth, the representative department head of Schenley's finds that such-and-such work has been done.

Now, those—in each instance, I think, I have cited, there are three basic documents and they evolve themselves into a fourth document, which is

(Testimony of Earl I. Johnson.)

a check in payment for the services, are required on the West Coast—is that—

Mr. La Shelle: Q. Now, taking the, I think the second one that you mentioned, where there is a contractual obligation, you are purchasing something under contract in such a classification, when the vendor sends in an invoice and it goes through a bank with a sight draft, with warehouse receipt invoice attached, will you tell the Court what procedure is followed as to the completion of that transaction, what supporting documents, if any, are kept, and where, and if they're kept in more than one place how they are kept and where? In other words, what are the mechanics of handling that?

A. Well, as I said, it isn't always necessary we have a warehouse receipt. That is one of the classifications or one of the things which we—

Mr. Fisk: I ask that go out as not responsive.

The Referee: It may go out. We are talking about the second classification that you gave.

Mr. La Shelle: Q. In other words, if I may—

The Referee: With the warehouse receipt.

Mr. La Shelle: Q. If I may reframe the question again, you have the second class involving a contractual obligation. Under that contractual obligation, the vendor draws a sight draft on Schenley's, with a warehouse receipt and invoice attached; will you tell us the mechanics of handling that, how it's paid, what is done with the supporting documents, if any, and where they go and how they are preserved, how you check them to see whether the

(Testimony of Earl I. Johnson.)

invoice should be paid and the draft should be honored, and what is done? What is the established procedure in that connection?

The Referee: If I might add to Mr. La Shelle's question, start right from the time that there was a contract under number two, for the purpose of material or supplies or anything else on the number two deal, what happens?

The Witness: All right. When a contract is issued, you have to go back to the origination of the contract, because your contracts are various, and they require in some instances changes of requirements, require supporting [605] documents or the method, or the final resting place of the supporting documents. When a contract is prepared by our Legal Department, it is generally prepared in several copies. There is a copy maintained, of course, in our Legal Department out here, and there are abstracts of that contract which are drawn off and issued to all who might be interested in that contract. I repeat, a copy of all contract digests——

The Referee: Pardon me, when you say here, "all who might be interested", you are talking about Schenley departments?

The Witness: That's right, Schenley West Coast Departments, I am restricting it to that now. I receive a copy of all abstracts; in the event that there is a contract which is subjected to audit, which we have in many instances, I call for a complete copy of the contract and use that in my audit work,

(Testimony of Earl I. Johnson.)

rather than use the abstract of that contract. Now, in the type of—

The Referee: Pardon me a minute, what do you call an abstract of the contract?

A. It's a short form digest, where we take the—

The Referee: Q. Made by whom?

A. It's made by our—in some instances, our Legal Department out here. Now, all of the digests of that nature are made by New York.

The Referee: Very well. Go ahead.

The Witness: In the type of contract which Mr. La Shelle [606] has brought out, if the requirements were that a payment be made on the basis of sight draft, we have to require, if it's stipulated in the contract, that before final payment is made, that we have in support of that payment in our offices here on the West Coast the three major types of supporting documents, which I have already quoted. The checks may be issued or the checks may be drawn before we have that first support, but before the check is finally issued in payment to the vendor or whoever is designated in this case, I believe we stipulated the Bank, before that is made, we have to have full acknowledgment that we are going to have those three types of supporting documents we already have—

Mr. La Shelle: Let me stop there, if I may. Let's assume that under a contractual obligation to buy something and the vendor utilizes a system of drawing a sight draft on Schenley with warehouse receipt and invoices attached, when Schenley gave you

(Testimony of Earl I. Johnson.)

notice of the draft at the bank, exactly what is done? Take it step by step.

A. Either according to the terms of the contract stipulating—if it's a quantitative purchase, and so forth, or by a copy of the vendor's invoice received, we determine in our Accounts Payable Department what the amount of the payment should be, covering that particular merchandise. On the basis of approvals, which are required under that contract or by designated approvals on the West Coast, as it might be, there are certain authorized signatures or check where the [607] approval must be obtained. A check is drawn for the amount of the invoice, the invoice is checked, extensions, additions, and so forth, and then the check is drawn on a request made by the recipient of that invoice. The check is drawn and taken to the bank, and upon the surrender of the documents in question, which are going to be our support for that payment made, those documents are surrendered by the bank, and the check and payment is turned over to the bank.

Q. Now, before the check is turned over to the bank, is any comparison made between the invoice that Schenley has and the invoice that the Bank has? Does anybody go over there to check that under that system?

A. In the type of transaction which you are citing, Kirk, the bank would furnish Schenley with notification that they did have these documents on hand. Before the check was actually drawn, some representative of Schenley might be in our Ac-

(Testimony of Earl I. Johnson.)

counts Payable Department, might be in our Cashier Department, depending on what has been required, would go to the bank and ask to see the documents, would be able to inspect or see that they agreed in amount with the copy of the documents which had been forwarded to us.

Now, in many instances the bank would have more than one copy of an invoice. They would have an original and a duplicate copy of that invoice, and the bank would, when they received these upon notification to Schenley, would turn over to the Schenley representative a copy of the original invoice, which [608] they are holding, with the copy of the warehouse receipt attached, to the Schenley representative. That would be taken and checked by the Schenley representative, and if it was in agreement with the amount which had been already checked by our Accounts Payable Department, check would be drawn, turned over to the Schenley representative, brought back to the bank, the bank upon surrender of our check to the bank,—the documents being held by the bank would be turned over to our representative.

Q. All right, now, assuming that you have got up to that stage, and under a transaction of that nature, you have given the bank a check in exchange for the warehouse receipt and the invoice, so you have then the supporting papers and your warehouse receipt, and if copies and the invoice, in due course, I take it, you get the cancelled check back?

A. That's right.

(Testimony of Earl I. Johnson.)

Q. All right. So then, following the completion of the transaction, by the end of the month sometime when the cashed checks come through, then you have a cancelled check, an original warehouse receipt, maybe some copies of that, and a number, two or more copies of the invoice?

A. That's right.

Q. And you also have, I think you call it, a voucher?

A. A voucher.

Q. And what is the voucher, just explain that to the Court.

A. The voucher—when a check is made up, it's only one [609] check. In support for distribution purposes, coding purposes, inter-company transactions, showing to the various departments for entry into their books, there's certain coding information contained on there, which shows on the details of the check, it's a copy of the check, in effect, and it's typed—the top part of the voucher, particularly, is an exact copy of the check. That is here, so that we have complete information in the files as to the check; while the check is attached to that, we have attached to that all the supporting documents. That's our key document, up until the time the check is returned. The check, for internal control purposes, never gets back to the Accounts Payable Department. That is retained in a separate file, and that happens on the West Coast operations—the checks which are returned by the banks come to my immediate attention. They are held by my Department.

(Testimony of Earl I. Johnson.)

Q. Now, we have reached the stage where this hypothetical transaction is closed and you have got a cancelled check, and you have got an original warehouse receipt, and one of those copies of it and a number of duplicate invoices and a voucher. Now, with reference to preservation of those documents, if the warehouse receipt is a receipt, say, for bulk spirits of some kind, where is that kept?

A. That's kept in our Production offices at 850 Battery Street, San Francisco.

Q. And with reference to the supporting documents consisting [610] of the cancelled check, the voucher, and the duplicate invoices, what is the established procedure as to their preservation?

A. The cancelled check, upon return from the bank, is kept within the Internal Audit Department files under our control at all times. The remaining documents are kept in the Accounts Payable Department at 900 Battery Street, San Francisco.

Mr. Fisk: The remaining document being what—enumerate them?

The Witness: First, a copy of the voucher, the copy of the invoice—now, in the case of a contract, there may be correspondence in connection with the transaction, there may be coding—supporting coding documents, which have no connection actually with the transaction, which are important for inter-company purposes, and they will have in the Accounts Payable Department either copies of the contracts, or abstracts of the contracts, pertaining to those payments.

(Testimony of Earl I. Johnson.)

Mr. La Shelle: Q. All right, now. With reference—that's a local transaction here on the West Coast.

The Referee: Pardon me, Mr. La Shelle.

Q. Now, is that a complete picture of the transaction under number two on the West Coast?

A. Yes, in the type of transaction which Kirk asked about.

Q. Mr. La Shelle asked you about, and also with the three generalizations that you gave before.

A. That's right. [611]

Q. But just as far as the West Coast is concerned? A. That's right.

Mr. La Shelle: Q. Now, with that West Coast transaction that we have just been talking about, it's complete out here, but are any of those supporting documents sent to New York? A. Yes.

Q. Tell us what about those.

A. Under Schenley procedure, the New York office obtains copies or facsimile copies of all contracts which we enter into. They're maintained—in fact, the original copy today of those contracts are maintained in our New York Cashier Department. Abstracts of all contracts are turned over to the Accounts Payable Department and other interested Schenley departments in New York. The New York office has the right to, and does, review all transactions which are made on the West Coast; all payments which are made by the Accounts Payable Department. Every payment made by the Accounts Payable Department is entered on a check register,

(Testimony of Earl Johnson.)

a copy of which goes to the New York office, and in support of every entry on the check registry, there are submitted to the New York office a copy of the voucher, a copy of the vendor's invoice or, if we cannot obtain a copy of the—no copy of the vendor's invoice, one for our files and one for the New York, in certain instances there would be a copy, a facsimile copy taken of that invoice. Generally, the original goes to the New York office; the facsimile is kept here. The checks on [612] all West Coast transactions since December, 1948, are maintained by the Internal Audit Department on the West Coast. Prior to that date, the checks were submitted to the New York office Internal Audit Department.

Q. You mean the cancelled checks?

A. The cancelled checks.

Q. Now, with reference to a contractual obligation for the purchase of something like bulk spirits under a contract, in which the transaction was made between the New York office of Schenley and of the vendor, do you know what the established procedures are in the New York office?

A. Yes, I do.

Q. And will you explain that to the Court in the same manner that you explained the local transaction?

The Referee: It's five after three.

Mr. La Shelle: Do you want to take a recess?

(A brief recess was taken.)

After Recess

(The last question was read by the reporter.)

(Testimony of Earl Johnson.)

Mr. Fisk: May I make an objection on the ground it's ambiguous as to what is meant by "transaction".

Mr. La Shelle: I think perhaps I'll have to reframe the question. I'll reframe the question.

Q. Under the second classification that you mentioned of a [613] contractual obligation, where there is a contractual obligation to purchase something in the nature of bulk spirits here on the West Coast, and the contract either calls for the transaction to be between the New York office of Schenley and the vendor, or it is handled that way; in other words, the mechanics don't go through the local office but are between the New York office of Schenley and a vendor; what is the established procedure in handling that?

A. I could shortcut it by saying it's the same practice as we handle—the same method or the same practice is handled as we handle out of our San Francisco office. Is that sufficient, or do you want me to go——

Q. Well, I think you better go into it a little more. In other words, what does the New York office do? We found out what you do locally. What does the New York office do?

A. The New York office requires the same type of supporting documents that the San Francisco office does. In other words, there would be first your prime document, the contract or a copy thereof; secondly, there would be a copy of the vendor's invoice; third, there would be a copy of the warehouse

(Testimony of Earl Johnson.)

receipt or the equivalent thereof, as required by the contract or by general practice. If similar transactions were entered into by the New York office as the type of transaction which pertained to the San Francisco office, the bank, upon receipt of the warehouse receipt and copies of the vendor's invoice, under sight draft, would notify [614] Schenley that they were holding such-an-such documents, and that payment upon surrendering of payment to the bank that such-and-such documents would be surrendered to the Schenley representatives. The Schenley representative of the New York office would go to the bank, obtain a copy of the vendor's invoice, and after checking that copy of the vendor's invoice to the supporting documents already held in the Accounts Payable Department in New York, having the extensions, the footings, checked, and see that the items shown on the invoice correlated to the requirements of the contract, they would request that a check be drawn for the amount of the invoice, the charges, or original—the sight draft, if it covered more than one invoice.

Then they would take those documents, the check principally, bring that to the bank, turn it into the bank, and receive the original documents consisting of the warehouse receipt and the original copy of the invoice from the bank, and that would be held in the New York office. In this case the warehouse receipt would be held in the Cashier Department in New York, the support for payment consisting of the copy of the voucher and the supporting docu-

(Testimony of Earl Johnson.)

ments to that voucher, with the exception of the cancelled check, would be held in the Accounts Payable Department in New York.

The cancelled check, upon return by the bank, would be held in the New York Internal Audit Department.

Q. Now, with reference to Petitioner's Exhibit Number 30 and 31, [615] did you assemble those documents at my request? A. I did.

Mr. Fisk: May I interrupt you, Mr. La Shelle, at this point? I think, Your Honor, that in the interest of orderly procedure, that we should have the right of examining the witness on voir dire at this time as to what he just testified to, before Mr. La Shelle offers these documents.

I assume you are leading up to offering the documents?

Mr. La Shelle: I am not going to offer the documents today, and I am not going to offer them by this witness.

Mr. Walsh: We are still entitled to examine him on that.

Mr. Fisk: I thought if he was going to offer documents, on the voir dire I would be entitled to clarify, in my own mind at least, testimony of the witness regarding these three methods.

Mr. La Shelle: This witness, alone, cannot qualify all of the documents; he can qualify some of them, but——

Mr. Fisk: But you are going to offer some of them, are you not?

(Testimony of Earl Johnson.)

The Referee: But Mr. Fisk said, but you are going to offer some of them while this witness is on the stand.

Mr. La Shelle: No.

The Referee: Off the record.

(Discussion off the record.)

The Referee: Mr. Walsh, on behalf of the Trustee, you [616] have heard Mr. La Shelle's statement that he is not going to offer any. Now, with that statement, the Court bearing in mind that Mr. Johnson has just testified as to the three methods, the three transactions, are you willing to waive your cross examination with reference to the methods that Schenley uses on the three particular types of transactions, both on the West Coast and on the East Coast, until Mr. La Shelle goes further with his examination?

Mr. Walsh: Well, I am willing to reserve my cross examination until he has finished with the witness.

The Referee: Mr. Fisk, now, you are not——

Mr. Fisk: I would prefer to do it now, but if Mr. La Shelle objects, I will defer it.

The Referee: Very well. You may proceed, Mr. La Shelle.

Mr. La Shelle: All right, now.

Q. With reference to Petitioner's 30 and 31, consisting of these various documents, did you assemble those at my request? A. Yes.

Q. And——

(Testimony of Earl Johnson.)

The Referee: Off the record.

(Discussion off the record.)

Mr. La Shelle: I intend to show that, with reference to these two groups, that pursuant to my request, that he assembled these documents; that, following the established procedure of Schenley to find these documents, he went to where they should be under the established procedures, and there he [617] found all of these documents where they were supposed to be. The documents consist of cancelled checks and vouchers and invoices, and what-not, as well as the warehouse receipts. Now, I realize that that testimony alone cannot qualify the warehouse receipts, in view of the objection heretofore made as to due execution. I'll have another witness to qualify the due execution of the warehouse receipts, and I'll also have another witness for these letters. This testimony will be limited to the Schenley records of cancelled checks, vouchers, invoices; under the Business Records Act, we will contend that they are admissible in Evidence. That's roughly what I intend to go into, and I thought it might be some help to the Court if I told you.

The Referee: And that's just what I thought you were going to ask, and it would have to be on the assumption based on established business practices, and so forth, of Schenley. You have got these records, and so forth and so on, which is just the point that I am concerned about, that Mr. Fisk and Mr. Walsh would like to cross examine Mr. Johnson with reference to the practices and the business

(Testimony of Earl Johnson.)

methods of Schenley on these particular types of transactions.

Mr. La Shelle: If the Court thinks it would be helpful, I have no objection.

The Referee: Is that the very point? They are going to immediately object when he says something about established business practices of Schenley's, and they are going to say, [618] "Well, we haven't had an opportunity to cross examine him on the established practices of Schenley's." Is that right?

Mr. La Shelle: Surely. In my opinion, there are gaps in the papers.

The Referee: Well, at this time, with reference to, first of all, qualifying Mr. Johnson, and, secondly, with reference to his hypothetical explanations of the three particular types of transactions, unless you have something further to offer, I am going to afford Mr. Walsh and Mr. Fisk an opportunity to cross-examine Mr. Johnson with reference to those three particular types of transactions—where the records are kept, where they go, what Schenley and their representatives—

Mr. La Shelle: In other words, it would be a voir dire examination of that particular phase of his direct.

The Referee: Correct. Now, if Mr. Fisk proceeds first on the cross examination, it is still understood and stipulated that Mr. La Shelle has reserved his objections with reference to the Anglo cross examination with reference to 30 and 31.

Mr. La Shelle: That's right.

(Testimony of Earl Johnson.)

Voir Dire Examination

Mr. Fisk: Q. Mr. Johnson, regarding the second matter that you have testified to, that is employed on the Coast, that is where there is a production written contract, and subsequently there is production and sales made by the producer to Schenley under that contract, and the transaction [619] handled with the local office in San Francisco; if I recall your testimony correctly, you said that oftentimes in the transaction, where there was a sight draft with papers attached at the bank, notice given to Schenley by the delivery of—or notice of the existence of the sight draft there at the bank—that oftentimes there were a number of copies of the warehouse receipts? A. No.

Q. Well, you said, both in your answer, if I remember correctly, and Mr. La Shelle in his question, that at times there were a number of copies of warehouse receipts?

A. That was a mistake, if I said it. It was invoices which I referred to.

Q. Well, now, before we leave the warehouse receipts, would it be a copy of the warehouse receipt, or the original warehouse receipt at the bank?

A. It would be the original warehouse receipt at the bank.

Q. And no copy of it? A. No.

Q. In other words, all that Schenley received when it delivered its check to the bank was an original warehouse receipt? A. No.

Q. Along with other papers?

(Testimony of Earl Johnson.)

A. Along with other papers, yes.

Q. But there were no copies of that warehouse receipt? A. No.

The Referee: Mr. Fisk, for the purpose of clarity, [620] your statement with reference to Mr. La Shelle's question to the witness is exactly the same as my recollection.

Mr. Fisk: No question about it.

The Referee: I mean, in other words, the record will bear that out, that Mr. La Shelle will ask him, with reference to warehouse receipts and copies of warehouse receipts, and when the witness answered he did not eliminate any copies or—

Mr. La Shelle: I think I did use that, although it may have been inadvertent.

Mr. Fisk: Q. Now, after Schenley turned over its check to the bank and received the original warehouse receipt, what did it do with the warehouse receipt in the West Coast transaction?

A. The warehouse receipt itself was turned over to the Production Department representatives, who controlled the bulk whisky inventories—bulk whisky inventories of the West Coast.

Q. Bulk whisky inventories of the West Coast?

A. That's right.

Q. And who would be the head of that department during the period from the last half of 1948?

A. It would be under Mr. Baglin or Mr. Donnelly, who was Mr. Baglin's superior.

Q. Under his immediate supervision?

A. Yes.

(Testimony of Earl Johnson.)

Q. Now, would the warehouse receipt received be negotiable [621] or not negotiable?

A. It might be either. In the West Coast offices, however, we only maintained the non-negotiable warehouse receipts. The only things we retained out here were our files.

Q. If it were a negotiable warehouse receipt, what would be done with it?

A. It might be held in here temporarily, but there would be notification immediately given to the New York Cashier's Department; and ultimately, if the negotiable warehouse receipt were retained by the Company, it was not resold, it would be held in the New York Cashier's Department.

Q. Now, was there any other transaction of the character you have testified to, in your method, too, than those between Hedgeside and Schenley in California? A. Yes.

Q. Where?

A. Well, we have storage in a number of warehouses out here, which are under outside, or owned by outside warehousemen. There would be warehouse receipts in support of those. There has been production out here between Schenley and American Distilling Company, over in Sausalito, I believe it is, where we have that type of transaction.

Q. Is there any other distillery of the character of Hedgeside in the State of California than the American that you referred to at Sausalito?

Mr. La Shelle: Just a moment, Your Honor. I'll submit this isn't a proper voir dire cross ex-

(Testimony of Earl Johnson.)

amination, or any cross [622] examination. He has not testified what distilleries are located in California.

Mr. Fisk: Your Honor, he has testified to a method or practice followed in California, and obviously he has testified to it as a general practice. If there was only one customer of the character he is talking about, it could hardly be designated as a general practice.

The Referee: Q. Well, Mr. Johnson, you tell me, other than Hedgeside and merely as far as Schenley's are concerned—never mind what other distilleries are on the West Coast—what other besides Hedgeside Distillery that Schenley's carry on the same type of transaction? You mentioned the American Distillery.

A. In this particular type of transaction, the only one I recall is with American Distilling Company.

Q. That is as far as Schenley is concerned?

A. That's right.

Q. Regardless of how many distilleries there are on the West Coast. I am not expecting you to answer that.

A. That's right.

Mr. Walsh: Your Honor, please, I think maybe, in all fairness to the record, one question was asked in California. Your question was as to the West Coast. And does the witness understand the question was the West Coast?

The Referee: In answer to Mr. Walsh's request for clarification, you may clarify that; if there is

(Testimony of Earl Johnson.)

something [623] other than California, you may clarify that. You have American Distilling Company in California. Now, let's say the West Coast.

A. As far as the particular type of spirits produced, I believe the American Distilling Company is the only other one.

Q. Would that take in Washington and Oregon—I mean, as far as Schenley's transactions on this particular type of a transaction that was entered into with Hedgeside, where you have stated that you think that in the American Distilling Company the same type of transaction—now, at the time we were talking about California and the West Coast, so there will be no misunderstanding, would your answer be the same if we included Oregon and Nevada and Arizona? A. Yes.

Q. You referred to the original written contract as between the producer and Schenley as one of the prime documents, in fact, the first prime document, and I believe you said that in both the West Coast and the East Coast transactions the original of that document was forwarded to New York and kept in New York? A. Yes.

Q. And in certain instances, in the number 2 transaction, you received a facsimile copy?

A. That's right.

Q. On the West Coast. In the number 2 transaction, did the contract provide for the form of the warehouse receipt that you were to receive on that type of transaction? [624]

A. Not that I recall, no.

(Testimony of Earl Johnson.)

Q. Did it, or does it, according to general practice that you have encountered during this period in question, make any reference whatsoever to the type of warehouse receipt you shall obtain in order to give approval and payment on a transaction?

Mr. La Shelle: You are talking generally, not this particular contract.

Mr. Fisk: That's right.

A. As to form, no.

Mr. Fisk: Q. Does it, in any manner, refer to the warehouse receipt?

A. I would have to refer back to the contract, in order to get an answer to that.

Q. Well, when you testified as to your number 2 practice, that is, sales under contracts, you had in mind a general form of contract that was used, did you not? They had certain similarity, did they not, these contracts you had in mind?

A. Certain similarity as to being a basic contract, but they were widely divergent.

Q. Well, in each one of these contracts, wasn't there certain basic provisions appearing in each one of these contracts? A. Yes.

Q. And wasn't there a basic provision in each one of the contracts with reference to the warehousing and the method [625] of receiving?

A. Yes, generally. I couldn't answer that on a specific basis, though, without referring to each contract. Generally, yes.

Q. Well, what did it provide for generally as you best recall?

(Testimony of Earl Johnson.)

A. It provided for the production of a certain type of products by the vendor if it were a production contract, or the sale of certain types of products or items by the vendor in case of a sales contract.

Q. Did it provide whether goods sold under the contract were to be warehoused?

A. No, in a case of bulk spirits which are carried in bond, it might or might not specify the warehouse. It would always specify if it were in bond, it would have to be in an I.R.B.W.

Q. Well, take the West Coast transaction, who would determine whether or not the warehouse receipt offered by the bank conformed to the requirements of the contract?

A. It would be a combination. The Cashier's Department, at the time the transactions on the contract were going through, the Cashier's Department would be the determining point that the provisions in the contract fully protected Schenley's interests. That's subject to review by the heads of our Production Department, by the Internal Audit Department, by various others.

Q. All before payment was made on the sight draft, is that right? A. No, no.

Q. Well, what did you do—the person that you sent over from [626] the West Coast office, to examine the papers at the bank, what did he do and what did he look for with respect to the warehouse receipt to tell whether or not there had been conformity under the contract?

(Testimony of Earl Johnson.)

A. As far as the warehouse receipt was concerned, it had to cover the particular spirits or merchandise which was being paid for on the vendor's invoice.

Q. And that was all? A. That was all.

Q. Nothing else? A. Nothing else.

Q. As long as it was being purchased in bulk, that is, in barrels or drums, if it specified that it was spirits grain and so many barrels and the serial numbers, that's all you required?

A. That had to correspond to what was shown on the invoice.

Q. I see. A. That's right.

Q. Each of those features corresponded to the invoice, and it, of course, included Schenley's name on it? A. That's right.

Q. And the name of the warehouseman on it. That was enough, is that right?

A. That's right.

Q. Could it be held negotiable or non-negotiable, within the discretion of the vendor?

A. No, generally it was within the discretion of the [627] contracting parties and so shown on the invoice or in the contract.

Q. Now, you also referred to copies of invoices. Did the bank have copies of invoices, or did it have the original and one or more copies, or only the original?

A. It would have an original and one or more copies.

Q. The bank would?

(Testimony of Earl Johnson.)

A. The bank would, right.

Q. And that would be the invoice of the vendor, who was one of the contracting parties, is that right?

A. That's right.

Q. Now, what did your contract require in substance, appear on the invoice? I am talking about the basic things now. I recognize there could be some deviation.

A. Are you referring, Mr. Fisk, to the particular contracts which we are working on now?

Q. No, no.

A. In general.

Q. You have testified, under your so-called second method, to a general practice followed by the West Coast. Now, I am having in mind your testimony as to the general practice, and you must have had in mind, in order to give such a method, some general form of contract employed on the West Coast. Now, I am thinking of that form of contract. What did the substance usually require be stated in the invoice?

A. Well, in general, the type of merchandise which was purchased by Schenley, the quantity which might vary very widely, [628] as between bulk whisky or grain purchases; in proof gallons generally the price which was to be paid, either on a tentative or a final basis, according to the terms of the contract, and changes with respect to review of those prices on the basis of audit. I mean, in other words, in some instances contracts provide that a tentative payment be made, subject to change,

(Testimony of Earl Johnson.)

on the basis of subsequent audit. That's about the general qualifications in all contracts.

Q. It had to be addressed to Schenley, of course? A. Yes.

Q. And it was dated? A. Dated, yes.

Q. And it was numbered?

A. Usually, not necessarily, I mean. That's generally accepted as one of the requirements of business practice, who it is addressed to, and that it's dated. That they're numbered, and so forth, is not required.

Q. Was it required that it be signed?

A. Not always.

Q. Well, was it ever required that it be signed?

Mr. La Shelle: What do you mean, by "it"?

Mr. Fisk: He said "if required".

Mr. La Shelle: No, I mean, what do you mean by "it"?

Mr. Fisk: The invoice, I am talking about.

A. No, that's not generally required.

Mr. Fisk: Q. Was it required that the invoice [629] designate the warehouse where the goods covered by the invoice had to be stored?

A. It's possible it might. In other cases, it might not.

Q. What was the usual practice?

A. Generally, that would be up to the vendor's discretion, if it were an acceptable point by Schenley.

Q. I see. Did you require that the original invoice in the hands of the bank have the written approval of one of your representatives signed on it?

(Testimony of Earl Johnson.)

A. That was not required—it is not generally required, but it may be.

Q. I am speaking in general.

A. In general, no.

Q. In general, no; but sometimes yes?

A. Sometimes yes.

Q. Did you require that there be a sight draft?

A. In some of the contracts, that's stipulated; in other contracts, it's not required. That's generally determined at the time of the preparation of the contract between the parties involved.

Q. I am speaking now of the transaction that is handled through the bank?

A. No, it would not have to be. An account could be assigned to the bank for collection purposes, which would not be stipulated in the contract.

Q. In other words, there were instances where the vendor would sell production to Schenley under a written contract with Schenley and assigned the right to receive payment to the bank?

A. Yes.

Q. In which case, how would he notify the Schenley Distillers of the fact of the assignment?

A. Well, it could be in a number of ways. It could be by written advice, it could be by the terms of the contract, it could be by an amendment of the contract, it could be by telephone advice, it could be by contact by telephone advice and affirmation by the bank that such would be the procedure, and sometimes it's stipulated on the—I say, in instances,

(Testimony of Earl Johnson.)

not with any particular reference to what we have done, that I can recall, where the bank has a right of assignment and all invoices are stamped to the effect that all payments to be made by the Company or to that particular vendor are to be paid to the bank.

Q. Did Schenley ever make the practice of taking up papers at the bank and pay to the bank with sight draft, merely on a telephonic advice of an assignment to the bank?

A. No. Not without clearance by both the bank and the other party. I say, that there is a wide divergence of practice in transactions of that nature, which are all accepted.

Q. In the instance where you had a sight draft transaction at the bank and there was the original invoice and one copy there, did you ever make the practice of having the vendor [631] furnish you with an additional copy of the invoice, outside of the copy turned over to the bank?

A. Yes, yes.

Q. And what did you do in that instance?

A. There are other departments besides the Disbursing Department in Schenley's who are vitally interested, particularly in the case of bulk spirits. Schenley projects their production probably six to eight months in advance of actual bottling. In the case of spirits present, for instance, they establish at the time what they are going to produce, we will say, for the forthcoming months. They have to know that those spirits are available and on hand.

(Testimony of Earl Johnson.)

They may be requiring the—in short, they schedule what their production requirements are going to be for the forthcoming months, so a copy of an invoice would be very valuable to our department to know what spirits are going to be available for their production purposes.

Another purpose for which such a copy might be used is to give the Accounts Payable Department advance notice of how much funds are going to be required to be on hand in their disbursing bank account to meet the payments which are going to be called upon for the next few days; or sometimes our disbursements of the West Coast might run as high as a million dollars a day. We would have to know in advance some basis on which we could obtain funds and hold them in our bank to meet those requirements. [632]

Q. But you did not require at any time, where you were purchasing on sight draft, that the invoice be signed by the vendor, did you?

A. I wouldn't say in any case. In some instances—

Q. Your usual practice?

A. Usual practice, no.

Q. It would be the exception?

A. It would be the exception.

Q. To receive it that way, is that true?

A. That's right.

Q. Well, we will take the case where you are notified by the banks that a sight draft is in the bank, together with a warehouse receipt and invoice,

(Testimony of Earl Johnson.)

and you send your Inspector over there, to go over with a check and turn it over to the bank and receive the warehouse receipt and invoice. To whom do you make a check payable?

A. That, again, could be stipulated in a contract——

Q. Now, bearing in mind that I have asked you as to the transaction where you have a sight draft, to whom do you make your check payable?

A. On a sight draft it would be made payable to the bank.

Q. It would be made payable to the bank designated in the sight draft. A. That's right.

Q. Would it make any difference as to who drew the sight draft as to how you make the check payable?

A. Yes, generally it would. [633]

Q. Well, will you explain that answer? Do you mean that, if you had, for instance, the X-Y-Z vendor drawing a sight draft on the A-B-C bank that it would make a difference as to whether you drew your check to the A-B-C bank, as to whether or not it was X-Y-Z who drew the draft, or P-D-Q; is that what you mean? A. Oh, yes, yes.

Q. In what way would you change the form of your check, depending on who made out the draft?

A. The form of the check itself would not change, but there would be a check-back as to the reason why somebody was drawing the sight draft for somebody else. There might be dual interests. In some instances we find an assigned account, which

(Testimony of Earl Johnson.)

is another, I believe, accepted business practice, an assigned account. An account may be assigned by a company to a collection agency, in which case the collection agency might be drawing the sight draft, in order for us to recover the property.

Q. In other words, before you would pay the money to the bank on a sight draft, you would want to know who drew the draft, is that right?

A. We would want to know who was finally going to receive that money. I mean, is it going to clear our account with the producer or the seller?

Q. In other words, you weren't just satisfied with receiving the goods for your money? [634]

A. Not necessarily, no.

Q. You wanted to know who was going to get the money, is that right?

A. That's right.

Q. In all instances? A. Yes.

Q. And then, what determination did you then make, after paying a sight draft, to see who got the money?

A. That determination would generally be made before, not afterward. We would have a clearance of an account. Certainly, if we didn't pay and we received merchandise under an account and we had paid for that merchandise or we didn't pay it until we had the documents in support of receipt of that merchandise, if the payment didn't ultimately arrive in the hands of the vendor and we would know it's there. But before that, we would have to have some acknowledgment, some knowledge, some

(Testimony of Earl Johnson.)

way of knowing that that particular vendor was receiving payments, either directly or through assignments or through the bank channels.

Q. But weren't you getting your goods for your money? What did you care where the money went?

Mr. La Shelle: We submit, Your Honor, that is not proper cross examination, as to what they cared.

Mr. Fisk: I am examining him on continuity, Your Honor.

The Referee: Overruled. You may answer.

A. Yes, certainly, I could get, if we cited it into a personal [635] case, certainly, if I could obtain goods from one person where it wasn't his property, if I paid him and didn't obtain a release somehow or other, in some form from the party who actually owned that. I mean, I would have to know that I would have to protect my interests.

Q. In other words, on these sight draft transactions, you wanted to be certain, before you turned over your money to the bank, who was going to get the money, because you were looking to your transaction with that person, rather than the fact that you received property for money, isn't that true?

A. Well, it's a combination of both. Transactions are dual. We are certainly going to receive property for our money when we make a payment. We also know that, somehow or other, that the payment is going to the person who had the right to that property before.

(Testimony of Earl Johnson.)

Q. Well, the bank has the right to the money, do they not? A. On the sight draft, yes.

Q. Then, why would your responsibility extend beyond paying the money to the bank, in your opinion?

A. (There was no answer.)

Q. I am not asking you that question, Mr. Johnson, as a matter of law or academic curiosity. I am just asking you from a standpoint of your knowledge of Schenley's practice on the West Coast.

A. Of course, we would assume that a large amount of the responsibility on the payment of moneys into a bank would [636] be the fact that the bank would have title or had the right to pass that title to the property. However—

Q. You went further than that.

A. We would go further than that, yes.

Q. Now, what became of the sight draft after you paid it? I am talking about the West Coast now.

A. On the West Coast, the sight drafts are held—they are usually held as one of the supporting documents in payment. However, at the time—

Q. You have previously listed, though, for us today as one of the supporting documents?

A. No.

Q. But you say now that it is, according to West Coast practice on a number 2 method or transaction, where sight drafts are employed, it is one of the supporting documents that's kept, is that right?

A. That's right.

(Testimony of Earl Johnson.)

Q. Now, where is it kept on the West Coast transaction?

A. At the time of the contracts with Hedgeside, the October 13 contract with Hedgeside, we had a department in our San Francisco office, termed the Cashier's Department, through which all payments to creditors were made. Our procedure at that time was such that when these payments were made on these sight drafts, the copy of the sight drafts was retained in the files of the Cashier Department in the normal course of business. About a year and a half ago, that department, as far as the whisky operations, were discontinued. [637] The files of the Department were turned over in part to our Production Department, under which our Accounts Payable Department or Section now operates; part of their files were put into our dead storage, and possibly part of them were destroyed. I know that in the instances of the sight drafts concerned, these particular contracts with which we are concerned, I have checked through all the logical points on the West Coast in the office, but I have been unable to find them.

Mr. La Shelle: Your Honor, it's five after four, and anticipating the usual recess time, I have an appointment over in the city. I am supposed to be there as soon after 4:30 as I can, so I think I will have to go, because we usually recess at this time.

The Referee: Very well, gentlemen.

(Thereupon an adjournment was taken.)

January 11, 1950—11:00 a.m.

(Same appearances.)

The Referee: All right, Mr. La Shelle, whenever you are ready. Mr. Fisk was in cross examination.

Mr. Walsh: For the record, your Honor, I understand this is a voir dire cross examination.

Mr. Fisk: That is right. Just one of the methods he has testified to.

The Referee: And also subject to the stipulation, with reference to Mr. La Shelle objecting to the right of the bank to go into these.

Mr. La Shelle: I think the record is pretty clear on that, your Honor.

EARL JOHNSON

previously sworn, resumed the witness chair and testified further as follows:

Further Voir Dire Examination

Mr. Fisk: Q. Mr. Johnson, at the last hearing—at the close of the last hearing, you were testifying with respect to methods employed by the West Coast office, and by the New York office, where you had a contract and where you bought on a sight draft. Now, in Petitioner's Exhibit 31 for Identification, in one of those groups of papers attached [639] to warehouse receipt 3386-B, you have attached what purports to be a letter of Schenley Distillers Corporation to Hedgeside Distillery Corporation, Post Office Box 269, Napa, dated March 31, '47, from the Accounts Payable Department of

(Testimony of Earl Johnson.)

Schenley Distillers; and suppose you look at that letter and tell me what it purports to be.

Mr. La Shelle: Your Honor, I object to that question on the ground it's not voir dire examination.

Mr. Fisk: Yes, it is, it's preliminary to that.

The Referee: Wait a minute.

Mr. Fisk: Excuse me.

Mr. La Shelle: I have not been permitted to ask any questions about these Exhibits as yet of this witness. Leave was asked for a voir dire cross, as to his qualifications.

Mr. Fisk: I'll withdraw it, to save time. I'll withdraw it.

Mr. La Shelle: It's proper cross at a later time, but not now.

Mr. Fisk: Q. With respect to these methods employed, you testified that, in addition to the time Schenley paid its check, in addition to obtaining the warehouse receipt from the bank, they saw to it that the money went to the proper person. Now, did the New York office have a practice of addressing a letter to the person to whom the money paid on the sight draft was to go?

A. Not necessarily, Mr. Fisk. [640]

Q. Well, not necessarily. Did they make a practice of doing it at all?

A. No, within the operations of the Accounts Payable Department, or any other department, the heads of those departments have a wide discretion on the handling of any given transaction, on just

(Testimony of Earl Johnson.)

how they clarify anything which may be used as a supporting document or as an aid to the clearance of those bills.

Q. Well, is it your testimony, then, that the New York office did not make a practice of addressing a letter to the person to whom they intended the money to go, on the payment of a sight draft?

A. They could, but it wouldn't be necessary.

Q. Well, is it your statement that they did not have such a practice?

A. In the normal course of business, no.

Q. Well, then, you would say it would be a rather exception that such a thing would be done in the normal course of business, is that right?

A. Not necessarily, no. I would say that it would be up to whoever was handling the particular transaction in which they were dealing to decide whether a letter would be used or other forms of advice.

Q. Well, regardless of whom it would be up to, was it a frequent occasion under their practice that such a thing was done? [641]

A. I couldn't say how frequent. I'd say that it has been done and it could be done, but it would be up to the particular person handling that transaction to say whether he wanted to use that form or——

Q. On the average, in New York, was it done 50 per cent of the time, or 1 per cent of the time, or 99 per cent of the time, or what is your estimate? You're familiar with the practice of New York, are you not?

(Testimony of Earl Johnson.)

Mr. La Shelle: I object to that; just a minute, your Honor. That's a complex question, containing two separate and distinct questions.

Mr. Fisk: Strike out the last portion of it.

The Referee: Read the question with the last part stricken.

(The reporter read as follows):

“Q. On the average, in New York, was it done 50 per cent of the time, or 1 per cent of the time, or 99 per cent of the time, or what is your estimate?”

The Witness: I don't believe I can give an estimate on that.

Mr. Fisk: Q. You have no idea? A. No.

Q. Now, what about the West Coast?

A. I would say the same answer would apply.

Q. The same answer is that you have no idea?

A. No.

Q. How often it was done? A. No. [642]

Q. Was it ever done on the West Coast?

A. Well, in many transactions there's correspondence in connection with clarification of terms, and so forth.

Q. Well, did the Schenley Company have a form letter for giving such a notice in their files?

A. No, not as a form letter, no.

Q. They did not have such a form letter?

A. No.

Q. Either in New York or in San Francisco?

A. Not as a regular-to-use form letter. They may have an improvised, and somebody within a particu-

(Testimony of Earl Johnson.)

lar department might have set up what they considered to be a form letter for that purpose and use it on occasion, but not as a standard requirement.

Q. Well, now, Mr. Johnson, how was — strike that out. Who determined what would be the standard requirements of the practice of the Company?

A. The person or persons who had been handling the particular series of transactions within the Accounts Payable Department, or the Cashier's Department.

Q. All right, let's take the period from—during the years '47 and '48, who determined that in New York.

Mr. La Shelle: I don't quite understand that question, "who determined that?" I can't pin down that.

Mr. Fisk: Well, determined the standards of practice.

The Referee: The standards of practice.

A. The standard of practice within an accounting department [643] are determined by the person who is heading up that accounting department, and it's at his discretion of the support he needs, outside of the types of support which I have given, which are required in connection with any particular transaction.

Mr. Fisk: I ask that the answer go out as not responsive, and that the reporter read the question back to him.

Mr. La Shelle: I submit it is.

The Referee: Read the answer, and the question.

(Testimony of Earl Johnson.)

(The last question and answer were read by the reporter.)

The Referee: It may go out.

Mr. Fisk: Q. Do you understand the question, Mr. Johnson? Who determined, during the years '47 and '48, what the standards of practice of New York would be with respect to these matters we are talking about?

A. Within the Accounts Payable Department, where most of these transactions or most of the supporting documents had been obtained, the head of the Accounts Payable Department.

Q. And who was that during those years?

A. Mr. Laubenheimer.

Q. During the period '47 and '48 it was Mr. Laubenheimer?

A. As far as I can recall that now, yes.

Mr. Walsh: Will you spell that name, Mr. Johnson?

The Witness: L-a-u-b-e-n-h-e-i-m-e-r; that was in New York.

Mr. Fisk: Q. And how did Mr. Laubenheimer, during [644] those periods, record his determination as to what would be the standard of practice?

Mr. La Shelle: Your Honor, I submit that that's not proper voir dire cross examination to ask this witness what a man did and why he did it. I submit that is not proper voir dire or any cross examination.

The Referee: Well, Mr. La Shelle, the witness has testified that he was familiar with the practice in

(Testimony of Earl Johnson.)

New York, and was familiar with the practice on the West Coast. Mr. Fisk is testing his knowledge on that subject.

Mr. La Shelle: Well, I submit.

The Referee: Read the last question that Mr. Fisk asked.

(The last question was read by the reporter.)

The Referee: If there is an objection, it is overruled. You may answer.

A. In order to answer that, I have to refer back to previous testimony which I have given in connection with any particular transaction.

Mr. La Shelle: Also assumes something that he did record it. There is no evidence that he did record that. It assumes something not yet testified to about it, is the vice of that question.

The Referee: Did he record, written or in any other manner?

A. No; a requirement of that nature would not be required to [645] be written. It would be up to the discretion of the head of the particular department.

Mr. Fisk: Q. Then, is it your testimony that, as to the standards of practice of the Accounts Payable Department during the years '47 and '48, it was entirely within the discretion of Mr. Laubenheimer, is that correct? A. No.

Q. Without any recording as to what the practice was? A. No. I said——

Q. What is your testimony?

A. My testimony was that in support of certain

(Testimony of Earl Johnson.)

types of transactions, there were certain required supporting documents. Those are standard. That's required under all accounting procedure, whether it's Schenley or otherwise.

In addition to that, the head of any particular department, may or may not decide that he wants to write, that he may telephone, he may go into conference, he may want any additional information, and it's up to his discretion, and what he might determine as additional to support the payment of a bill.

Q. Well, now, do I understand your testimony to be this, Mr. Johnson: that in New York, during the years '47 and '48, there were certain recorded standards of practice in transactions of this kind, is that right?

A. Not recorded standards of practice, but standards of practice which are determined on the basis of accounting [646] requirements.

Q. You mean general accounting requirements as occur all over the country, is that right?

A. Yes.

Q. They have no particular standards of practice whatsoever, is that right, that were recorded in any written document on file with the Company?

A. We do have standards of practice which originate out of the New York office, and which are controlled there, but they merely supplement or expand on information or on requirements which are established because of regular accounting requirements.

(Testimony of Earl Johnson.)

Q. How are those standards recorded with the Company?

A. They're recorded in Standard Practice Manuals.

Q. And are those Standard Practice Manuals available here on the West Coast?

A. Yes, copies of them are.

Q. And do you have any in your possession?

A. I do.

Q. Is the same thing true with respect to the practice in San Francisco?

A. Yes.

Q. And you have in your possession such a manual in respect to San Francisco practice, is that right?

A. I might—yes, the answer is yes, but I'd like to explain that. Most of the practices followed in the West Coast Division, as I have already testified, in the Whisky [647] Division, are controlled by the New York office, and a manual of that nature, if it needs revision out here to fit the needs of an operation, the New York Manual is supplemented to fit—I mean, we do not have the volume of help out here that we have in New York, so we have to fit the program according to our needs, so we follow, generally speaking, the New York Standard Practice Manuals.

Q. Is it your testimony, then, that New York has a manual of standard practice, and that the West Coast follows that manual, except that it has a manual which supplements the New York manual

(Testimony of Earl Johnson.)

to fit the particular needs of the West Coast; is that right?

A. There wouldn't necessarily be a separate manual. The New York manual might be supplemented with correspondence or supplementary information pertaining to the particular manual from the New York office. It wouldn't necessarily be a separate manual.

Q. May the New York manual be varied by the West Coast practice?

A. Oh, yes, yes, within the discretion of the department heads operating.

Q. In other words, the West Coast practice is that the individual department head may, within his discretion, vary any standard of practice of the New York manual; is that right?

A. If he has a reasonable foundation for making such variation, yes. [648]

Q. Would the West Coast make a practice, during the years '47 and '48, of notifying in writing the person or corporation or partner, to whom they expected a payment on a sight draft to go?

A. No.

Q. They did not? A. No.

Q. At any time during that period?

A. No.

Q. Did New York do it at any time during that period, in the discretion of the head of the department involved?

A. Some correspondence I have seen in the particular Exhibits, I believe they did on occasion.

(Testimony of Earl Johnson.)

Q. But you have no personal familiarity with the practice of New York in that regard, is that right?

A. It's not—that practice, again, is not a requirement on the part of either New York office—

Mr. Fisk: I ask the answer go out.

The Referee: So ordered.

Mr. Fisk: Q. Do you understand the question?

A. I'd like to have it read again.

(The last question was read by the reporter.)

A. Not in that regard, no.

Q. Are there any other discretionary practices that the New York office may have employed that you have no familiarity with?

Mr. La Shelle: Just a moment, your Honor, we submit that this is not proper voir dire examination.

The Referee: Mr. La Shelle, pardon my interruption, [649] but the witness testified that he was familiar with the practice, as carried on in New York.

Mr. La Shelle: He said he was familiar with the practice of all documents and essential documents to preserve in support of a transaction. We are not attempting to put those in under the Business Records Act. And I don't think that Counsel is familiar with what is in point here. We are not trying to introduce in Evidence any Schenley procedures. We say there are certain things that are essential supporting documents, such as a cancelled check and the invoice, and so forth. Those are essential sup-

(Testimony of Earl Johnson.)

porting documents, to be kept in the regular course of business. When we went to assemble this evidence, Mr. Johnson went where those should be under Established Procedures, and they were there, and here they are.

Now, if I may have that for a moment, I can explain what I mean, your Honor. Under the United States Code, under Procedure, Section 1732, and this refers to this Court as well as other Courts, here it says:

“In any court of the United States and in any court established by the Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event shall be admissible as evidence of said act, transaction, or occurrence, [650] or event or within a reasonable time thereafter. All other circumstances of the making of such a writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term ‘business’ shall include business, profession, occupation and calling of every kind.”

Now, we have here, which we are looking toward introducing in Evidence, just to take the first one as a matter of illustration to the Court, using the originals instead of the photostats, here is a cancelled check of Schenley, here is the cancelled draft of Franciscan, here is the original invoice of Franciscan, and Accounting Distribution, which is some

(Testimony of Earl Johnson.)

internal record that they keep; these are all original documents, standing of and by themselves. They practically speak for themselves.

Now, all this man is saying is that he knows when a transaction of that kind is done, certain supporting documents should be preserved under standard accounting procedures that would apply to any company. When he went to look for them, he looked to where they ought to be, and he got them. Now, whether or not somebody might regard [651] a letter about it in his discretion, or this and that, and just what that man did do under a given circumstance, has nothing to do with the qualification of these documents.

The Referee: First of all, as far as the Code Section is concerned, the Code Section says, documents kept in the regular course of business.

Now, that's what started all this controversy. Now, who is going to determine what documents are kept in the regular course of business?

Mr. La Shelle: He has already testified to that.

The Referee: And Mr. Fisk is cross examining him on the subject.

Mr. La Shelle: No, he is cross examining him as to whether the head of some department might, at his discretion, write certain letters in connection with those documents.

The Referee: Well, it's entirely possible that Mr. Fisk might be aiming at maybe in the regular course of business there was kept other documents that are not included in these, or maybe there are some

(Testimony of Earl Johnson.)

documents in some of these Exhibits that are surplusage; I don't know.

Mr. La Shelle: Well, I submit, your Honor, that these documents here, which I have mentioned, the cancelled drafts, the cancelled check, the original invoice, that that is sufficient to establish that transaction. Now, if somebody [652] wrote a letter about it and questioned something, this and that, that doesn't add anything to the picture. Why we paid it? Why did you do this? The fact is, the draft came through from Franciscan; it was honored, it was paid; that showed in the cancelled draft that went through the regular banks, our cancelled check paid the bank, we got the invoice, matches up and ties in by serial numbers to the warehouse receipts. Now, did you want to make sure that that reached them? Now, are you sure that the bank paid them? Some fellow might be suspicious of the bank, but it's not going to change that transaction.

The Referee: Are each one of these sets that make up the Exhibit for Identification identical?

Mr. Fisk: If that's not a form letter, I don't know what one is.

Mr. La Shelle: But does that add anything to the transaction?

The Referee: Well, then why offer it?

Mr. La Shelle: Well, none of this has been offered yet.

Mr. Fisk: It's before the Court for Identification.

Mr. La Shelle: This is a voir dire cross examina-

(Testimony of Earl Johnson.)

tion. Now, if some of these letters, probably quite a few letters here that are self-serving, probably wouldn't be admissible on that basis. Now, the fact that on some occasions they might have sent a letter, and on other occasions they did not, how does that change the fact that a draft was honored, [653] it was paid, and an invoice was given, and a warehouse receipt? It neither adds nor detracts to the transaction.

Mr. Fisk: That's what I am trying to find out, and you don't want us to do it.

Mr. La Shelle: No, I say it's utterly incompetent on a voir dire or any other cross examination. It amounts to this: that you presumed that a man did an act. In other words, Schenley honors that draft, your Honor, and they got this invoice and they got the warehouse receipt. That ties into it. Now, Schenley might have written fifty letters, but it wouldn't change that transaction.

The Referee: I don't know that.

Mr. La Shelle: Well, I mean, as a matter of law it wouldn't.

The Referee: I can't prejudge the matter, Mr. La Shelle. Mr. Fisk—

Mr. Fisk: What law establishes that, Mr. La Shelle? Am I deciding the law?

Mr. La Shelle: Plain, common sense.

Mr. Fisk: You are talking about the law of common sense, now.

Mr. La Shelle: No, here is a draft which has been honored and paid. Now, it has been honored and

(Testimony of Earl Johnson.)

paid. Why it was, what comments were made about it, are all immaterial. The fact was that it was honored and paid.

Mr. Fisk: We don't know whether it was or not. [654]

Mr. La Shelle: Well, if these documents don't establish it, what would?

Mr. Fisk: Well, maybe you could prove it; I don't know.

Mr. La Shelle: I say that that proves it.

Mr. Walsh: Your Honor, please, how can the Court or opposing Counsel determine without proper cross examination, whether certain documents have been probably omitted from the files that are in Court?

The Referee: Or added to.

Mr. Walsh: Or added to, yes.

The Referee: Mr. Fisk, you may continue.

Mr. La Shelle: Nothing has been omitted. We got what was there.

The Referee: Well, Mr. La Shelle, opposing Counsel and the Court don't know that. I mean, your statement is that you got what was there, while Mr. Fisk and Mr. Walsh want to be certain that you got all that was there.

Mr. La Shelle: We don't propose——

The Referee: Or that they didn't get something extra.

Mr. La Shelle: There are various things that must be gone over. For example, we haven't offered any of this yet. We haven't even been able to ask

(Testimony of Earl Johnson.)

our witness one single question pertaining to this. There are lots of things—for example——

Mr. Walsh: Well, why argue, discussing it now, then? [655]

Mr. La Shelle: We are not going to offer any letters in Evidence on the thing, and they don't mean anything; they're incompetent.

Mr. Fisk: If the Court please, Counsel a moment ago objected to my referring of those documents and I withdrew my question. I am not referring to the documents on that account, and I don't know why Counsel should refer to them. This witness has testified at a previous hearing that he had personal knowledge as to the practices of the New York office in transactions of this kind and the West Coast office, and he testified what the practice was, and he went far beyond any entries in the book and records of Schenley, and I submit that I am entitled to test him as to his knowledge and as to whether or not there were other transactions that he testified to, which had to do with the method he has testified upon. It has nothing to do, or rather, it isn't confined to any documents at all. We are not talking about documents now. It so happens that Counsel—why, I don't know—maybe he made a mistake before the Court by offering for Identification certain letters—form letters of notification evidently employed by the New York office, because there are a great many of them, and now he evidently feels that was an unwise move, and he wants to——

Mr. La Shelle: Mr. Fisk would be the first to

(Testimony of Earl Johnson.)

object that I did nothing. In other words, Mr. Fisk is entitled to any reasonable cross examination, but when he [656] goes into something that would be incompetent and subject to his opposition if I even try to get it in, supposing one fellow might have written ten letters about something, how does it change the picture? It's not competent evidence.

The Referee: He is still cross examining him on Mr. Johnson's knowledge of the practices used in New York.

You may proceed, Mr. Fisk.

Mr. Fisk: Will you read the last question, Miss Reporter?

(The last question was read by the reporter.)

A. Numerous ones.

Q. Numerous? A. Yes.

Q. Now, do you have the New York manual with you here this morning? A. No.

Q. You are in a position to produce it, are you not? A. Yes.

Q. And do you have the warehouse supplementary manual? A. Yes.

Q. And you are in a position to produce that?

A. Yes.

Mr. Fisk: I am going to ask the Court to direct the witness to produce those at the next hearing, your Honor, please. I would like to have an opportunity to examine those manuals, because it seems to me that the witness's testimony is that the New York practice as to certain basic elements is controlled by the New York manual, that it may [667]

(Testimony of Earl Johnson.)

be supplemented on the West Coast by a West Coast manual, and that either of them may be valid in any respect by the discretion or at the discretion of the individual head of the department at the time, which seems to me nullifies his entire statement as to what is the practice.

It had no practice which could be placed before this Court by general testimony, by a witness of this character, because there was none on his own testimony. It could be valid at any time by the particular head for any reason, even as to the basic elements. That's his testimony.

Mr. La Shelle: Now, your Honor——

Mr. Fisk: I submit that his testimony should go out. I move to strike it on that account.

Mr. La Shelle: Are you all through, Mr. Fisk?

Mr. Fisk: No, I am going to be here for several more weeks.

Mr. La Shelle: Months, I'll say.

(Laughter.)

Mr. Walsh: Who started it?

Mr. La Shelle: I mean, are you through with this particular argument?

Mr. Fisk: No, sir, not if you're going to keep on arguing.

Mr. La Shelle: Are you going to continue, so that I won't interrupt you?

Mr. Fisk: I finished my last statement. [668]

Mr. La Shelle: I see. So you're all through.

Mr. Fisk: I finished my last statement.

Mr. La Shelle: If it please the Court, we object

(Testimony of Earl Johnson.)

to that on the ground it's incompetent, irrelevant, and immaterial. And I also object to the summary of evidence Counsel just gave, as being in direct conflict with the record. This witness has stated that under standard accounting procedures, applicable to any large company, certain documents are always preserved in support of that transaction, and he named them, such as the invoice and the draft, and so forth. He then said that they had certain manuals. The New York manual can't fit exactly the West Coast. They don't have the help out here, and it's in the discretion of the individual executive or semi or minor executive to vary them in his discretion, provided he has a reasonable foundation for it. I think I am quoting his exact words, which is entirely different than Mr. Fisk stated.

Mr. Fisk: You are entirely wrong.

Mr. La Shelle: Just a moment. I can say this, for the benefit of Court and Counsel. These manuals are here. They're available, and if the Court instructs us to produce them, we will, of course, comply with the Court's order. They are long, they're varied. The witness has stated that the standard accounting procedure, which he knows as an accountant what to preserve—he knows that from his standard accounting practices. I don't think it's [669] competent or of any help in this case at all. This man has stated that he knows that certain documents are required. He said other documents may be kept in addition to them, but certain documents are required

(Testimony of Earl Johnson.)

under standard procedures. He went to get those documents where he knew they should be preserved, and they are.

Now, if we go into anything further in this, as a matter of saving time—have you got that case on that, Jack, I would like to cite to the Court? In other words, to go through that manual, just to get through the index to the thing, is quite a job, and it covers a thousand and one other things not in issue in this case. I am not afraid of anything in the manual; that is not the point.

The Referee: The Court is not going to instruct Mr. Johnson to bring the manual at this time, in any event.

Mr. Fisk, do you have anything further on the cross examination of this witness that's knowledge of the practices in New York and San Francisco?

Mr. Fisk: No, I have not at this time, but I would like to strike his testimony as to the methods on the grounds that if—strike that out. I have just one question I would like to ask.

The Referee: Very well.

Mr. Fisk: Q. Mr. Johnson, are you a C.P.A.?

A. Yes, sir.

Q. Are you a C.P.A., admitted to practice as a C.P.A. in [670] the State of California?

A. State of New York.

Q. But not in the State of California?

A. No, sir.

Mr. Fisk: Your Honor, I submit the witness is not entitled—he is not qualified as an expert to

(Testimony of Earl Johnson.)

testify as an expert on general accounting practices in the State of California.

The Referee: He is testifying as to Schenley practices.

Mr. Walsh: No, he testified also——

Mr. Fisk: Mr. La Shelle has stood up and said that these documents, or rather, the methods of practice here are a method of practice of general accounting practice, and that they are only supplemented by the various manuals and discretionary practices of Schenley. I submit he is not qualified as an expert to testify to general accounting practices.

The Witness: Might I make a statement?

Mr. La Shelle: Just a moment, please. If it please the Court, the fact that this witness is not a Certified Public Accountant in the State of California doesn't do away the fact of his education, which he has told us about, of accountancy and of what he knows. He could testify as to the standard procedure of accountancy, whether he's a C.P.A. or not. He studied it and he got it from his education and experience. [671]

Mr. Fisk: I submit that no foundation has been laid to qualify him as an expert.

Mr. La Shelle: I don't think that is any basis at all.

The Referee: His testimony may stay in. Overruled.

Mr. Fisk: Q. Is it your statement that it is general accounting practice, on the West Coast and

(Testimony of Earl Johnson.)

in New York and throughout the United States, for companies to keep all of the records that you have listed here in your statement at the last session were kept by Schenley in connection with a transaction of this kind for a period of three years?

A. Yes, generally. I mean, about——

Q. Not generally; I am speaking of your knowledge of general accounting practice throughout the United States. It is the practice of all companies to keep the list of records that you have enumerated here for a period of three years?

A. In the companies where I have worked, and the companies where I have reviewed the documents in support of such payments, yes.

Q. What companies have you worked with? You have worked with Schenley; now, who else have you worked with?

A. I have worked with——

Mr. La Shelle: I submit this is, again, going far afield. The witness has testified that he was a Certified Public Accountant with a company in New York. Obviously, he worked on many companies there. He stated that generally that is the practice, and he is asked for a general standpoint. [672] Now, you might find all kinds of things. As we were discussing the other day, some law firms keep their records a lot longer than others, but they all keep them a little while. To have this witness go in and draw on his memory at this date of all the various companies that he examined or reviewed or audited, or firms with Arthur Anderson Company, is going

(Testimony of Earl Johnson.)

far afield in a voir dire examination, Your Honor.

Mr. Fisk: I submit, Your Honor, the witness is not only not qualified to give the testimony that he has given, but that the testimony he has given is not true; it isn't correct. I think the Court can pretty nearly take judicial notice of the fact.

Mr. La Shelle: All right, Your Honor, if they think that they can put on any witness and show that this isn't correct, let them put him on; but there is a limit to a voir dire examination, Your Honor, and it's discretionary with this Court.

Mr. Fisk: I never heard of a man who puts on a man to testify as an expert to review, or rather, to object because we are cross examining him as to his qualifications.

Mr. La Shelle: I am saying, it is the Court's discretion to call a halt to this.

The Referee: The witness stated that, according to his knowledge it was the general practice.

The Witness: The general practice, yes. [673]

The Referee: It will not be necessary for him to answer the question, with reference to firms that he worked with or was associated with.

Mr. Fisk: That's all at this time.

Voir Dire Cross Examination

Mr. Walsh: Q. Just one question. Mr. Johnson——

Mr. La Shelle: Let the record show that you have the opportunity of Cross Examination at this time, Frank.

(Testimony of Earl Johnson.)

Mr. Walsh: This is not cross examination. This is merely voir dire. Don't let the record be confused.

The Referee: Off the record.

(Discussion off the record.)

Mr. Walsh: Q. Mr. Johnson, you have stated that you have had certain experience and training with Schenley in their Accounting Department.

A. Yes, I have.

Q. Now, having in mind that experience and training you have had, are you in a position to testify at the present time that you have knowledge of all of the transactions that are had in the New York office in their Accounting Department?

Mr. La Shelle: Just a moment; we will object to that question, Your Honor, as obviously calling for the witness's own views as to his qualifications. It is not proper voir dire or any cross examination—Do you think that you're an expert? That is what the question amounts to. [674]

The Referee: Will you read Mr. Walsh's question?

(The last question was read by the reporter.)

The Referee: That is of all of them, even the ones not connected with——

Mr. Walsh: No, I want to confine this solely to the ones that are connected with Hedgeside Distillery.

The Referee: Very well, you may answer, Mr. Johnson.

The Witness: I have to get my thinking the way

(Testimony of Earl Johnson.)

I saw the first question as it was stated, why, it has — have to change my thinking now in connection with the experiences——

The Referee: As to this transaction.

The Witness: As to this transaction.

The Referee: This series of transactions.

The Witness: Insofar as specifically required, supporting documents are concerned, yes.

Mr. Walsh: If Your Honor please, I ask that answer go out as not responsive.

The Referee: So ordered. Read the question again, please.

(The last question was read by the reporter.)

Mr. La Shelle: Will you read the answer?

(The last answer was read by the reporter.)

Mr. La Shelle: Well, Your Honor, I submit that is a perfectly good answer. It is the same as saying, “Yes, and I explain that by saying that insofar as the required [675] documents are concerned.” Obviously, he couldn’t know everything.

Mr. Walsh: Then, his answer is “No”.

The Referee: Then, he should say “No”, and if he wants to clarify his answer, he can.

Mr. La Shelle: It seems to me that the answer is all right. I move the answer be reinstated.

Mr. Walsh: You mean, you are asking the Court to set aside.

The Referee: It’s out. Mr. Johnson, you may answer Mr. Walsh’s question.

A. All right, then, the answer would be “No”, with an explanation.

(Testimony of Earl Johnson.)

The Referee: All right, let's have your explanation.

A. In various transactions, there may be more documents in the form of letters, coding documents, other information, which at the discretion of the department head are felt to be essential for his operation. Those, I would not have firsthand knowledge of. However, as far as the documents, which I have already testified to, which are required as standard documents in any particular transaction, I would have knowledge that those documents would be maintained in the New York office.

Mr. Walsh: Q. Now, Mr. Johnson, having in mind your answer just given, are you in a position to tell the Court that you are familiar with all of the documents which [676] are kept in each particular transaction had with Hedgeside Distillery Corporation?

Mr. La Shelle: Well, Your Honor, there again, I submit that is not proper cross examination. As to the required documents, yes. I can tell the Court and Counsel quite frankly, I have a stack of files this high of correspondence about this thing. It was one fight, from beginning to end, with Stone. Naturally, he can't do that. They're written by many different departments, accounting, everything. It was just one long battle with Stone.

The Referee: Well, I think he has answered it in this respect, that he said he was familiar with the basic documents, that in some instances there were other coding letters, and so forth, that were in ad-

(Testimony of Earl Johnson.)

dition to the basic documents that you are familiar with.

The Witness: Correct.

The Referee: Was that your testimony?

The Witness: That's right.

The Referee: So, when Mr. Walsh asks you if you are familiar with all of the documents in this Hedgeside transaction, if it included these coding letters, and so forth, why, your former answer would be that you are not familiar with those?

The Witness: That's right.

The Referee: Go ahead, Mr. Walsh.

Mr. Walsh: Q. Now, Mr. Johnson, is it your testimony [677] that you are in a position at the present time to testify all of the basic documents used in the transactions of Hedgeside Distillery?

Mr. La Shelle: Now, just a moment, Your Honor, we object to the form of that question. He has asked, "Are you in a position to testify?" That is for this Court to determine.

The Referee: Well, he doesn't have to testify on that subject at this time. On the cross examination as to his knowledge and practices of the San Francisco and New York office and his basic training as an accountant, and so forth, Mr. Walsh, he can be examined. As to documents that may or may not be required under those practices, as he knows them, as long as you are not asking him specifically about his knowledge of certain documents that are here. But as to his knowledge generally as to the

(Testimony of Earl Johnson.)

basic documents which would be required in all of these transactions, yes, he should answer that.

Mr. Walsh: Q. Well, Mr. Johnson, can you tell the Court now—Strike that out. Can you describe to the Court now all of the basic documents which are required in a transaction similar to the ones had with Hedgeside Distillery Corporation?

A. As far as payment is concerned?

Q. Read the question.

The Referee: The basic documents. [678]

A. The basic documents in connection with any transaction of this nature—

The Referee: That's right, of this nature.

A. Where we have a contractual obligation to fulfill, the basic documents, I have testified before that in any event we would require, either in the New York office or in the San Francisco office, a pro-forma, or facsimile copy, of the contract. We would require that in support of that payment. There would be a copy of the invoice submitted by the vendor. We would require that in evidence of payment after the payment has cleared in our Auditing Department. We would have a copy—or we would have the cancelled check which was issued in connection with that transaction.

Under our voucher system, we use a voucher form, on which are attached the invoice, and a reference would be made to the contract on the supporting documents that this here pertains to such-and-such contract.

I am having to talk general on this, because it

(Testimony of Earl Johnson.)

would apply not only in Hedgeside, it would apply in all. I have previously testified there are three principal—three documents.

The Referee: Just a minute. Just confine it to the Hedgeside, to this type of transaction.

The Witness: To reiterate, there would be maintained in the files a facsimile copy of the contract, of the contractual obligation, a copy or copies of the invoices in [679] support of payments or where we have been billed, and a copy of the cancelled check covering payment of that transaction.

The Referee: Any other basic document?

The Witness: Yes, there is a fourth basic document, but that would not necessarily be maintained in that department. That would be, as I have cited before, the receiving ticket or the—in the case which is at point now, the copy of the warehouse receipt, which due to production requirements is taken out of the Department and held at a several point or at another point.

The Referee: Would there be any other basic documents, regardless of what Department of Schenley they were kept in?

The Witness: Not as basic documents, no.

Mr. Walsh: Q. Well, Mr. Johnson, does your testimony also include the basic documents required by your Purchasing Department?

A. When—

Q. You can answer that question “Yes” and “No”, and then explain it if you want.

A. Yes, with an explanation, then.

(Testimony of Earl Johnson.)

Q. All right, you may explain.

A. When I was going over these cases the other day in Court, I cited that there were three types of transactions. The first was, I cited the use of the purchase order. The second I said, in lieu of the purchase order, the copy of the contract [680] was used. I believe that's the way my testimony went in.

The Referee: Well, now, Mr. Walsh's question, so there is no misunderstanding, including the purchase order, would your answer that you gave with reference to the basic documents in these transactions also take into consideration the Purchasing Department? A. No, no.

Mr. Walsh: Q. In other words, Mr. Johnson, you wouldn't be in a position at this time to testify as to the transactions which were had by the Purchasing Department of Schenley's with the Hedge-side Distillery Corporation?

Mr. La Shelle: Now, just a moment, Your Honor. I will again object to the form of that question in asking this witness if he is in a position to testify. I think that is a matter for the Court to determine as to what he can testify to and what he can't, and that's the vice of that question.

Mr. Walsh: I'll submit it.

The Referee: You may answer it, Mr. Johnson.

A. As far as I can recall now, the Purchasing Department would——

Mr. Walsh: Q. Just answer the question "Yes" or "No", and then you can explain your answer.

A. Read the question again, please.

(Testimony of Earl Johnson.)

(The last question was read by the reporter.)

Mr. La Shelle: We object to that question again, Your Honor, that it assumes there were transactions between the [681] Purchasing Department and Hedgeside. He has not yet been asked that. These questions all assume something——

The Referee: I think that he testified at our last hearing, with reference to receiving copies of the contract, which, in effect, then, would be one of their basic documents under number 2.

The Witness: That's right.

The Referee: That you spoke of, isn't that true?

The Witness: Yes.

The Referee: And whom would you receive that copy of the contract from, what department?

A. From our Legal Department or from our Cashier and Contract Department in New York.

Mr. La Shelle: There has been no testimony yet at all, that I know of, that there were any negotiations between the Purchasing Department, as such, and Hedgeside and Franciscan on the other hand.

The Referee: Was there, Mr. Walsh?

Mr. Fisk: The contracts in Evidence.

Mr. Walsh: My understanding of the testimony is that Mr. Johnson testified that there were certain documents of certain transactions handled by the Purchasing Department.

The Referee: That was my recollection. That's why I ask him with reference to the contracts, but I am certainly in a positoin to be corrected. My mind is not that infallible. Did you testify with

(Testimony of Earl Johnson.)

reference to the Purchasing [682] Department——

A. No.

The Referee: You did not? A. No.

The Referee: Very well. The question may go out.

Mr. Walsh: You mean the——

The Referee: I mean your question with reference to asking him whether or not he is in a position to testify with reference to the documents.

Mr. Walsh: Your Honor, I would like to submit the record on that, because Mr. Johnson very definitely gave me the impression that there were certain elements handled by the Purchasing Department.

The Referee: He did say, Mr. Walsh, I recall that he said that a purchase order would be the first type, isn't that true?

The Witness: That's right.

Mr. Walsh: Well, Your Honor——

Mr. La Shelle: Your Honor, if I may——

Mr. Walsh: Will you let me finish, Mr. La Shelle? Now, Your Honor, having in mind that testimony, we are entitled to ask him on voir dire his knowledge of the documents kept by the Purchasing Department. For all we know, there are other documents that are very material to these transactions.

Mr. La Shelle: Your Honor, if I may just make this for clarity? I don't purport to be an expert on the setup and the way large companies operate; but I think that Frank is [683] misconceived as to the Purchasing Department only goes into operation if

(Testimony of Earl Johnson.)

they make a purchase. If another department makes the contract and creates a legal obligation, it's my understanding I don't think the Purchasing Department would play any part in this. They purchase and——

Mr. Walsh: In this case they didn't purchase.

The Referee: That's just the point.

Mr. Walsh: Your Honor, that's what I am trying to find out.

The Referee: That's why I asked you, Mr. Walsh; in fact, I recall the witness testifying as to the three general types of transactions that Schenley's had, and one of them was by purchase order, but whether or not that method was used in this particular series of transactions, I am not in a position to answer.

Mr. La Shelle: It should first be determined, would the Purchasing Department play any part in this type of transaction? If it doesn't, then it's out.

The Referee: That is the reason I asked the question before, Mr. La Shelle. I am not certain.

Mr. La Shelle: The vice of his question was the assumption that it had, don't you see? They ask the witness, "What do you do in such-and-such a transaction" before they first ask him, "Did you have such a transaction". Then, having established that, he can go on from there.

The Referee: Mr. Walsh, you will have ample time. [684] We are going to recess until two.

Mr. La Shelle: Let the record show that Mr.

(Testimony of Earl Johnson.)

Walsh has unlimited opportunity of cross examination.

(Laughter.)

(Thereupon an adjournment was taken until 2:00 o'clock p.m.) [685]

Afternoon Session—2:00 o'Clock p.m.

EARL JOHNSON

previously sworn, resumed the witness stand, and testified further as follows:

Further Voir Dire Cross Examination

The Referee: Just before the recess, Mr. Walsh was going to check into the testimony of Mr. Johnson with reference to purchases.

Mr. Walsh: The reporter hasn't completed the transcript of the last day's hearing, but we have the question and answer here, that I submit leads right into this situation of the question of purchases. This is on page 511 of the transcript. The question is asked Mr. Johnson on direct examination. (Reading):

“Mr. La Shelle: Q. Now, with reference to purchases made, not on the West Coast, but purchases made in New York, do you know what that procedure is, as far as preserving documents?

A. Yes, I do.

Q. Tell us what that is.

A. I wasn't in the New York office——”

(Testimony of Earl Johnson.)

Now, I submit that question on direct examination brings in the question of purchases.

Mr. La Shelle: My point is, the purchases can be made [686] by contract outside of the purchase. I have no objection to this witness being asked if in a transaction of this nature the Purchasing Department plays the part that it does. I mean, if it does, he can be examined.

The Referee: Does it, Mr. Johnson? Does your Purchasing Department play any part, as far as these series of transactions with Hedgeside are concerned? A. No.

Mr. Walsh: Q. Well, now, Mr. Johnson, having reference to Petitioner's Exhibit 22-B, which is already in Evidence, who handled the transaction relating to that particular——

Mr. La Shelle: Now, wait a minute, the witness can't remember these things by numbers.

Mr. Walsh: Well, I'll tell you, 22-B is the contract between Hedgeside and Schenley.

Mr. La Shelle: Of October 13, 1947.

Mr. Walsh: Of October 13, 1947.

Mr. La Shelle: Let the record show that the witness has the Exhibit.

The Witness: Could I have the question repeated?

Mr. Walsh: I'll reframe my question. Strike that question out.

Q. What documents do you have in your possession now, Mr. Johnson?

(Testimony of Earl Johnson.)

A. It's Exhibit 22-B for Identification. It's in Evidence now. And it says, with—— [687]

Q. Just give me—is that the contract dated October 13, 1947?

A. It's the contract dated October 13th, 1947, between Schenley Distillers Corporation and Hedge-side Distillery Corporation.

Q. Yes. Now, Mr. Johnson, in this particular type of transaction had between Schenley's and Hedgeside Distillery Corporation, what department of Schenley's would handle that type of transaction?

Mr. La Shelle: Your Honor, I submit this is not voir dire examination now. This would be proper cross after I get through with using these Exhibits.

Mr. Walsh: I am not asking about this particular——

The Referee: You are asking about the type.

Mr. Walsh: That type of a transaction.

The Referee: You may answer. Overruled. That type.

A. Principally our Compliance Department.

Mr. Walsh: Q. Your Compliance Department.

A. Yes.

Q. Are you familiar with the records of the Compliance Department of Schenley's relating to that type of transaction?

A. I am familiar with such records as are used or subject to audit.

Q. I'll repeat the question again: Are you

(Testimony of Earl Johnson.)

familiar with all of the records kept by the Compliance Department relating to that type of transaction?

Mr. La Shelle: Well, I submit, your Honor, that goes [688] beyond the realm of cross examination on voir dire.

A Compliance Department is what the name implies, complies with a million and one things that this man couldn't possibly know about.

The Referee: Sustained.

Mr. Walsh: Your Honor, please, may I make an argument on that? Your Honor, what I am driving at is this: I know what Mr. La Shelle is going to do. He is going to have Mr. Johnson testify as to his knowledge of a certain department, and from his knowledge of the activities or procedures of a certain department he is going to try to attempt to introduce in Evidence certain documents.

Now, I submit, your Honor, that we have a right to know if there are any other documents, or if he is familiar with all the documents which are required in a particular transaction. What Mr. La Shelle is trying to do is to introduce in Evidence only certain, what he calls basic documents relating to a transaction. Now, for all we know, and we're trying to find out, that there are other documents, other supporting documents in each of these particular transactions, which may or they may not throw a different light on the entire transaction.

Mr. La Shelle: If I may be heard on that, your Honor——

(Testimony of Earl Johnson.)

The Referee: Just a minute, Mr. La Shelle. I think that Mr. Johnson has testified on two occasions with reference to the basic documents that are used—or that Schenley [689] have in the transaction such as we have before us now. He also mentioned the fact with reference to contracts that had been entered into, and then certain goods were furnished Schenley in accordance with those contracts.

Now, I don't expect Mr. Johnson to be in a position to testify with reference to the documents or the contracts, or their legality or anything else concerning them, from the Compliance Department. I do expect him to know the necessary documents with reference to his particular department and the procedure to be followed.

Now, one of the methods is, they receive a contract. That was the number 2 method you talked about, is that correct? A. Yes, sir.

The Referee: The number 1 is the purchase order? A. Yes, sir.

The Referee: Now, if he gets a contract from the Compliance Department, or his department does, that sets forth certain basic things that are summarized for the Accounting Department's proof by the Compliance Department, is that true?

A. Right.

The Referee: And then, in addition to that—

Mr. Walsh: Just a minute, your Honor, how can he testify—that's what I am trying to find out from the witness. Are those all of the documents

(Testimony of Earl Johnson.)

relating to that transaction had by the Compliance Department?

The Referee: Well, Mr. Walsh, what I am saying is, [690] this witness has already testified that that is what happens in their operation after a contract has been entered into. But he also admitted that he didn't know what had gone on before the final contract was finally entered into.

Mr. Walsh: But in the face of that testimony, your Honor, you have overruled the objection to all of his testimony.

The Referee: No, what I have said is this: that I am not permitting you to examine this witness with reference to the documents in the Compliance Department.

Now, we have Mr. Woolsey here, who testified that he either was the head man or had some such position with reference to the Compliance Department. If there is anything you need, Mr. Woolsey is available to offset that. Mr. La Shelle has put Mr. Woolsey on the stand, and I am sure he is available.

Mr. La Shelle: Oh, sure.

Mr. Walsh: That was the understanding, your Honor.

The Referee: Yes, but that is in the Compliance Department. Now, this gentleman here is in the Accounting Department, is that true?

The Witness: Yes.

Mr. Walsh: Q. Is a sight draft one of the basic documents in this particular type of transaction?

(Testimony of Earl Johnson.)

A. No.

Q. It is not? [691]

A. No. It's not required—

Q. That isn't my question, Mr. Johnson. Read the question again, please, Miss Reporter.

(The last question was read.)

Q. Well, Mr. Johnson, did Schenley pay the money due on one of these obligations without a sight draft?

A. That would depend entirely upon the requirements of the contract.

Q. Well, having in mind the type of transaction which was handled with Hedgeside, did they pay the money due on these obligations represented by sight draft—

Mr. La Shelle: And I submit—

Mr. Walsh: Let me finish.

Mr. La Shelle: Your Honor, we are going beyond the realm of *voir dire*.

The Referee: I don't think so, Mr. La Shelle. Mr. Walsh has asked with reference to the number 2 method that you spoke of, would a sight draft be required in that. I am adding my statement to Mr. Walsh's question.

A. No.

Mr. Walsh: Q. And, Mr. Johnson, as I recall your testimony, you described the sight draft method as the number 2 method? A. Yes.

Q. Well, let's go over it again and have you tell us again. I don't understand what you are talking about.

(Testimony of Earl Johnson.)

A. I believe I have already testified to this. [692]

Q. Well, I want to hear it again.

A. I believe I have already testified to this thing two or three times.

Q. Well, this will make the fourth.

A. All right. I said that, under the second type of transaction, by which transaction which we would enter into, there were four basic types of documents required: the contract, the copy of the vendor's invoice, a copy—or not a copy, but the cancelled checks upon completion of the purchase, and, fourth, a receiving ticket or the equivalent, which in the case which we are dealing with now would be the warehouse receipt. Those four were the basic documents, which I believe I cited.

Q. Well, now, confining yourself solely to the type of transaction had with Hedgeside, would a sight draft be required?

Mr. La Shelle: Now, there, again, your Honor, I submit that that is beyond voir dire, and the answer has already been given. It's been asked and answered. He said it would depend upon the provisions of the contract.

The Referee: He already answered that the answer was "No", as I remember the testimony of the witness. Not necessarily one of the basic documents, is that right?

A. That's right.

The Referee: Q. Would it be required, then, in answer to Mr. Walsh's question? [693]

A. I can qualify the answer of "No" that I gave

(Testimony of Earl Johnson.)

by stating that on this particular contract with Hedgeside and the contract with Franciscan, in addition to the payments which were made on the basis of sight draft, we also made payments on the basis of audits, which were not made to either one of the two corporations through the bank but were made directly to the corporations. Does that answer it?

The Referee: Well, now, just a minute. You have me slightly confused. Read Mr. Johnson's answer.

Mr. La Shelle: I might state, your Honor, to clear that up——

Mr. Walsh: Just a minute, your Honor, please, just a minute——

Mr. La Shelle: This was made just as an aid to the Court, and if the Court doesn't want it, just say so.

The Referee: Wait until the court reporter reads Mr. Johnson's answer until we dispose of this question here, and then you can make your offer. Will you read Mr. Johnson's answer?

(The last answer was read by the reporter.)

The Referee: Q. Well, then, the sight draft was included in these transactions with Hedgeside——

A. It was included, but——

Q. In all instances, or just in some of the instances?

A. In some of the instances, not in all.

Q. Not in all? [694]

A. Not in all, no, because, as I have stated in

(Testimony of Earl Johnson.)

my answer, your Honor, we made additional payments to those which were made through sight draft, so you have a combination. You have two types of payments which were made.

Mr. La Shelle: Your Honor, I think at this time——

Mr. Walsh: Just a minute——

Mr. La Shelle: Just a moment, I have something that I think would be of some help to the Court here.

Mr. Walsh: Just a minute, your Honor.

The Referee: I don't know what it is, Mr. Walsh.

Mr. Walsh: Listen, I am on cross examination, and if he's not satisfied with my type of examination, he should make his objection, not interject and try to talk to the Court. That's the proper way of conducting the examination.

The Referee: Well, now, just a minute, Mr. Walsh. Mr. La Shelle has predicated his interruption with the statement that maybe he has something that will be of some assistance or help to the Court.

Mr. Walsh: That's on redirect.

The Referee: Wait a minute, may be it's a short-cut to all of this; I don't know until I hear what it is. I am not in a position to pass on it. In the event that it is erroneous and then you want it stricken, you may then make the motion, and if I find that it is not proper, it will go out. [695]

Mr. La Shelle: I am not even going to say anything. I am going to ask the Court to read something.

(Testimony of Earl Johnson.)

Mr. Walsh: Am I going to be constantly interrupted in my cross examination by Mr. La Shelle, in fact, every two minutes about some offer he has to make?

The Referee: No, Mr. Walsh.

Mr. La Shelle: Your Honor, with reference to the drafts, this document is already in Evidence. I am quite sure that the Court has not had an opportunity to read the entire document. It may never even be necessary for the purposes of this case. It's a long, technical thing, but if the Court will read Section 11—

The Referee: From what Exhibit?

Mr. La Shelle: That's Exhibit Number—oh, oh.

Mr. Walsh: What is it, Mr. La Shelle?

Mr. La Shelle: 22-B. The Court will see how the method was set up, which I think will immediately clarify what the witness has said. It goes over into the next page.

The Referee: The mere fact that this contract says it should be handled this way doesn't prove that it was handled that way.

Mr. Walsh: Your Honor, what has that got to do with my examination of the witness?

Mr. La Shelle: I just asked the Court to read that section, section 11.

The Referee: Mr. Walsh, you may proceed.

Mr. Walsh: Now, will you read the last question and answer, please?

(The reporter read as follows):

“Mr. Walsh: Well, now, confining yourself solely

(Testimony of Earl Johnson.)

to the type of transaction had with Hedgeside, would a sight draft be required?

Mr. La Shelle: Now, there, again, your Honor, I submit that that is beyond voir dire, and the answer has already been given. It's been asked and answered. He said it would depend upon the provisions of the contract.

The Referee: He already answered that the answer was 'No', as I remember the testimony of the witness. Not necessarily one of the basic documents, is that right?

A. That's right.

The Referee: Q. Would it be required, then, in answer to Mr. Walsh's question?

A. I can qualify the answer of 'No' that I gave by stating that on this particular contract with Hedgeside and the contract with Franciscan, in addition to the the payments which were made on the basis of sight draft, we also made payments on the basis of audits, which were not made to either one of the two corporations through the bank but were made directly to the corporations. Does that answer it?

The Referee: Well, now, just a minute. You have [697] me slightly confused. Read Mr. Johnson's answer.

Mr. La Shelle: I might state, your Honor, to clear that up——

Mr. Walsh: Just a minute, your Honor, please, just a minute——

Mr. La Shelle: This was made just as an aid to

(Testimony of Earl Johnson.)

the Court, and if the Court doesn't want it, just say so.

The Referee: Wait until the court reporter reads Mr. Johnson's answer until we dispose of this question here, and then you can make your offer. Will you read Mr. Johnson's answer?

(The last answer was read by the reporter.)

The Referee: Q. Well, then, the sight draft was included in these transactions with Hedgeside—

A. It was included, but—

Q. In all instances, or just in some of the instances?

A. In some of the instances, not in all.

Q. Not in all?

A. Not in all, no, because, as I have stated in my answer, your Honor, we made additional payments to those which were made through sight draft, so you have a combination. You have two types of payments which were made."

Mr. Walsh: Q. Now, Mr. Johnson, in this type of transaction with Hedgeside, how would Schenley be notified [698] of the demand by Hedgeside of the payment of the obligation?

Mr. La Shelle: We object to that as not voir dire, your honor.

Mr. Walsh: Well, your Honor.

The Referee: We're going beyond the—

Mr. Walsh: Your Honor, he testified directly, he testified without any doubt on direct examination that one of the elements in this type of transaction—I'll read it to you: (Reading):

(Testimony of Earl Johnson.)

“The first one was the contract, the second one was the invoice, the third was the warehouse receipts, the fourth, the bank to notify Schenley by sight draft.”

That’s his testimony on direct examination. Now, he has testified on cross examination that the sight draft was not required on this type of transaction. So I want to have the record absolutely clear.

Q. Then, what do you mean on direct examination by the statement that the bank would notify Schenley by sight draft?

Mr. La Shelle: Your Honor, I submit that this is proper cross examination, but that it is not voir dire cross examination. That’s my sole point.

The Referee: Well, now, just a minute.

Mr. La Shelle: They are asking what was done in this case.

The Referee: Now, we interrupted direct examination to [699] afford Counsel for the Trustee and Counsel for the Anglo Bank an opportunity to examine the witness with reference to his knowledge of the procedure on the West Coast and in the New York office with reference to the Schenley operation, accounting practices, and so forth.

Now at this time the cross examination must be limited to that phase of it, without any prejudice against the attorney for the Trustee and the attorney for the Bank going into any phases of the cross examination; I mean, of the direct examination.

Mr. Walsh: That’s right. I am not attempting to go into that; I am just trying to test the witness’

(Testimony of Earl Johnson.)

knowledge of the procedures and documents required in this type of transaction.

The Referee: Very well. You may answer.

The Witness: I don't know where we left off. I have to go back to the last question again.

(The last question was read by the reporter.)

Mr. La Shelle: That is what I objected to, as I recall it, as not voir dire.

Mr. Ward: The objection was sustained.

Mr. Walsh: I'll reframe this.

The Referee: The original question is withdrawn, Mr. Walsh?

Mr. Walsh: Yes.

Q. What do you mean by your statement on direct examination [700] that a bank in this type of transaction would notify Schenley's by sight draft?

A. The particular contract may or may not state that a sight draft would be required in connection with certain types of specific payments. If a contract stated that a sight draft were necessary, then we would pay on the basis of that sight draft, but we would still require as basic supporting documents only the four which I have mentioned in past testimony: the additional copy of the sight draft might or might not be maintained as support. It's not a basic requirement. It could be, and normally we would maintain that.

Mr. Walsh: That's all, your Honor.

Mr. Fisk: Your Honor, in the light of—May I ask just a couple of questions?

(Testimony of Earl Johnson.)

Voir Dire Examination

Mr. Fisk: Q. Mr. Johnson, at the last session you outlined three methods of practice, did you not? A. Yes.

Q. The first method I believe you described generally as an order of purchase with that contract?

A. That's right.

Q. We'll forget that. The second method you described as a sale on contract? A. Right.

Q. In connection with the second method, you outlined a number of requirements in order to follow the process of Schenley, and one of those requirements was—you correct me, [701] if I'm wrong—where there was a delivery of goods under a contract that there be cash delivered, the Bank or whatever agent was handling the transaction, in payment of sight draft, isn't that correct?

A. Not in all cases, no.

Q. Well, now, in what case wasn't it, and we're talking about number 2; in what case didn't you have a sight draft under number 2?

A. I believe, Mr. Fisk, that I was talking in generalities at that time, that I was talking contracts. The contract form of transaction. Now, the contract, the terms of the contract itself would provide the method which would be followed. We might not make any payments under a contract through a bank; we might make direct payments.

Q. All right, where you had a contract that required a production contract under your number 2, that you required payment, cash, against sight

(Testimony of Earl Johnson.)

draft, was the sight draft one of your basic documents?

A. I've already answered that by saying "No".

Q. Well, would you answer it again?

A. No.

Q. It was not?

A. No.

Q. How would you pay the bank in order to conform to that contract under the method you are speaking of?

A. When I'm citing basic documents, I cite—

Mr. Fisk: Wait just a minute, I am going to ask that that answer go out as not responsive. [702]

Mr. La Shelle: Just answer the question and explain it, if it's necessary.

The Witness: Would you mind reading it again?

(The last question was read by the reporter.)

A. I'll have to go back further than that.

Mr. Fisk: Q. Do you understand the question?

A. I believe so, now. If a sight draft is required by the contract at the time the payment was made, we would require the presentation of that sight draft.

Q. As a basic document?

A. No, not as a basic document in the terms in which I have been dealing in basic documents.

Q. You would require a sight draft before you would make payment, though, would you not?

A. Yes, if it were provided for.

Q. But you would not treat that sight draft as

(Testimony of Earl Johnson.)

a basic document which you would have to retain in your files, is that right? A. No.

Q. And——

Mr. La Shelle: Wait a minute, I don't understand that.

The Referee: What does the "No" mean?

Mr. La Shelle: What does the "No" mean?

The Witness: I saw that after. There is a compound question there, I believe.

Mr. Fisk: No, I don't believe it's compound. It may be ambiguous. [703]

Mr. Walsh: It's not up to the witness——

The Referee: Mr. Johnson, you understand Mr. Fisk's question?

The Witness: I thought I understood it. Could I have it reread?

Mr. Fisk: I'll reframe the question:

Q. Why don't you treat the sight draft as a basic document in that instance?

A. Because, upon the conclusion of the transaction and after payment is made, the cancelled check is better evidence of the payment having cleared against that contract. The other supporting documents are more important than the sight draft itself. The sight draft would be only an intermediary support.

Q. All right. When you go to the bank and examine the papers under this method, too, do you examine the sight draft to see how much money to pay, or do you examine the invoice?

A. We would examine the invoice.

(Testimony of Earl Johnson.)

Q. If there is a discrepancy between the amount required in the invoice and the amount required under the sight draft, which do you pay?

A. Probably neither. I would ask for a correction, because the bank would not accept anything different than the sight draft, as I understand it.

Q. The sight draft, then, determines the amount of money you pay the bank, isn't that true, and not the invoice? [704]

A. No, you may have a sight draft in the hands of the bank which will not agree with our basic supporting documents. We don't then pay to the bank the amount of the sight draft. We would ask that a correction or check be made.

Q. Will the bank deliver you the documents or any of them until you pay the amount of the sight draft? A. No.

Q. Then the sight draft determines the amount of money you have to pay the bank in order to get the documents, isn't that correct?

A. Yes, but I have to explain on that too. If the sight draft did not agree with the supporting documents which we already had, we would not pay on the basis of sight draft. We would ask for a correction of the sight draft.

Q. But you couldn't get the goods or the documents with the bank in conformance with this contract until you pay the amount of the sight draft, isn't that true? A. That is correct.

Q. The sight draft is subsequently returned to you, cancelled, isn't that correct? A. Yes.

(Testimony of Earl Johnson.)

Q. But you do not retain it, and you do not regard it, as a basic document?

A. We do not regard it as a basic document. Normally, we do retain it.

Q. Now, you also get back the cancelled check, do you not? A. Yes. [705]

Q. But you do retain the cancelled check?

A. Yes.

Q. But you do not retain the sight draft?

Mr. La Shelle: I submit, your Honor, that that has been asked and answered. He said "Normally we do, but we don't regard it as a basic document." And I think that there is a limit that this witness should be called upon to answer the same questions.

The Referee: He is asking about the retention of the documents. You may answer.

A. Normally we would retain the copies of the sight draft upon cancellation in our files, but without the copy of the sight draft we would still have what we consider to be basic documents in support of payment under the contract.

Q. But you wouldn't have all of the basic documents, isn't that correct?

A. As far as we are concerned, we would have the basic documents, the items which I have cited in past testimony, the four basic documents.

Q. Is it your practice to retain only the basic documents? A. No.

Q. Well, what determines whether a document is basic or not?

A. I believe I have testified in the past in my

(Testimony of Earl Johnson.)

opinion, and in all my experience as an accountant, we consider that there are in this type of transaction basic business documents. In addition to that, there may be many more. [706]

Q. Is it your testimony that according to sound, general accounting practice, in a transaction of this kind, the canceled check is retained but not the sight draft?

Mr. La Shelle: Now, your Honor, I submit that this, again is asked and answered, and now it's about the fifth time coming up. He said he didn't consider it as basic document, normally they retained it; and it's just going over and over the same question again. I think there is a limit to this.

The Referee: You may answer. Overruled.

Mr. La Shelle: And additional objection—

The Referee: He didn't ask him about any basic document. He is asking him about the retention.

Mr. La Shelle: I know, but it's the vice of all of these questions that have been coming in. It assumes something absolutely contrary to what the witness has testified, and something that is not in evidence. It assumes that it is not retained. He has just said about six times, it is normally retained. In this question, it assumes it is never retained.

The Referee: Mr. La Shelle, Mr. Fisk is cross examining the witness on the practice. Now, he certainly is entitled to ask him the question with reference to what documents are retained.

(Testimony of Earl Johnson.)

Mr. La Shelle: No, but he assumes that it's not retained.

The Referee: He doesn't assume anything.

Mr. La Shelle: Yes, it does. [707]

The Referee: All right, if it assumes that, you clarify Mr. Johnson's answer to Mr. Fisk's question. The objection is overruled. Then if it needs clarification, you may go further.

The Witness: To make sure of my ground, I would like the question repeated.

(The last question was read by the reporter.)

A. Yes, with an explanation. In explanation of that, we always retain, that is, within the Company requirements, the cancelled check. In other words, that may be for a period of years. In some cases we destroy the cancelled check and have photostats made of it, retain it. A sight draft is normally retained in our files as one of the documents which we maintain in our files in support of these business transactions. But it is not a basic document which supports that transaction. We have what we consider to be better evidence than the sight draft itself. The cancellation of the check, the clearance of the check through the bank, is our evidence of final payment.

The Referee: Pardon my interruption, Mr. Johnson. Mr. Fisk is asking you with reference to the retention of these two particular documents, regardless of basic documents or not. He is asking you about Schenley's preserving the cancelled check and the sight draft. Now, what is your testimony with reference to that?

(Testimony of Earl Johnson.)

A. I would say the cancelled check is always retained; the [708] sight draft is normally retained but not required to be retained.

Q. According to your general practice, do you retain the cancelled check?

Mr. La Shelle: Just a moment, your Honor, that has been asked and answered on voir dire at least two or three times.

Mr. Fisk: Never been answered at all.

The Referee: I have never heard the answer.

(Discussion off the record.)

The Referee: I'll overrule the objection. And generally, Mr. Johnson, how long do you retain a cancelled check in this type of transaction?

A. Well, I can say at least three years.

Mr. Fisk: Q. Normally, how long do you retain the sight draft—normally, I am using your word.

A. Normally, we would retain it at least as long as the check.

The Referee: Mr. Walsh?

Mr. Walsh: I have no further cross examination for the Trustee on voir dire.

The Referee: Well, the Court will permit the witness to testify with reference to—you may proceed with the direct examination. The Court will permit him to testify with reference to his knowledge of the practice in New York and in San Francisco.

Mr. La Shelle: Just a number of things I would like to [709] take on redirect of voir dire for just a moment.

(Testimony of Earl Johnson.)

(Discussion off the record.)

Mr. La Shelle: 23, 24, 25-A, and 25-B are for Identification, your Honor, they are not in Evidence. Now, your Honor, at one time these were marked for Identification. We were offering them in Evidence and there was some objection, and I passed it for the time being. At this time we reiterate the offer of these documents in Evidence. They were qualified as to signatures, and so forth. Now, in the testimony of the witness here, the contract, of course, is the basic origin of the transaction such as this character. I mean, I am about to discuss in direct examination these various transactions here with the Franciscan Farm and Livestock Company, the drafts, invoice, and payments, and warehouse receipts.

Now the first one that I am going to deal with, simply for clarification, so the Court can understand my offer, took place in the spring of 1947. At that time, according to 23, 24, 25-A, there was a contract between Schenley and Franciscan, 24, 5 being notifications with reference to yield, proof gallons, and something like that. Under that contract, section 8, it states on page 7:

“The title to the distilled spirits or whiskey to be produced hereunder shall pass upon delivery to us, F.O.B. carrier, at Yountville, as above specified. Payment shall be cash against sight draft [710] with shipping documents attached, drawn upon the Bankers Trust Com-

(Testimony of Earl Johnson.)

pany, 16 Wall Street, New York, or such other bank as we from time to time specify.”

Mr. Fisk: I am going to object to reading in Evidence documents before they have ever been admitted.

Mr. La Shelle: This is offered purely by way of argument.

Mr. Fisk: I submit that is improper.

The Referee: Just a minute. First of all, by your own statement, Mr. La Shelle, you mentioned the fact that there were three Exhibits or four Exhibits that were formerly marked for Identification, but through some reason or other were never admitted in Evidence; is that right?

Mr. La Shelle: That's right.

The Referee: Now, first of all, I haven't had any offer of these documents at this time to be received in Evidence, and, secondly, the Court is not familiar at the moment with whether or not an objection was made, or whether they were merely marked for Identification.

Mr. La Shelle: The Court, as I recall it, objected to them.

The Referee: Well, if that be the fact, I will go along with Mr. Fisk's statement that these documents are still marked for Identification. They're here, but not Evidence, so you will have to proceed at the moment in the [711] normal way without reading a portion of the——

Mr. La Shelle: All right, then, I'll proceed in this way. We are reiterating our offer, now, in Evi-

(Testimony of Earl Johnson.)

dence, these copies of Petitioner's Exhibits for Identification 23, 24, 25-A and B, and I ask the Court, then, to read this document so it can pass, and be in position to pass upon its admissibility. And I have certain statements to make with reference to the contents of that contract to explain its admissibility.

The Referee: Well, before you read into it, you should certainly afford the Respondent Counsel an opportunity——

Mr. La Shelle: Your Honor——

The Referee: If you were making the offer in Evidence of these documents—is that what you are doing?

Mr. La Shelle: Yes. Now, may I make this statement. Counsel for the opposition have had photostatic copies of this document for weeks and have had every opportunity in the world to examine it, and have examined it, and this young man who was over here to my office came over to my office at my invitation and compared the originals——

Mr. Fisk: What in the world is the purpose of this statement, anyway? Who is complaining but you?

The Referee: Nobody is complaining.

Mr. La Shelle: Your statement that they have not had an opportunity to examine. [712]

The Referee: I said they haven't had an opportunity to object to your offer.

Mr. La Shelle: Then I state this, your Honor: that unless your Honor reads that contract, par-

(Testimony of Earl Johnson.)

ticularly the section in question, your Honor is not in a position to pass upon its——

The Referee: Well, it is entirely possible I wouldn't have to read it, in the event that the Respondents made no objection to your offering it in Evidence. But the Court doesn't know what their action is going to be until they have been afforded an opportunity, and until you have made the offer in Evidence.

Mr. La Shelle: I may have misunderstood you. I thought your Honor said "an opportunity to examine".

The Referee: Oh, no, an opportunity to object, and frankly, the Court at the moment is not aware of what their former objection is, if one were made.

Now, gentlemen, back to where we started from. Mr. La Shelle is now offering in Evidence Exhibits for Identification——

Mr. Fisk: May I have them one at a time, your Honor?

The Referee: Yes. Exhibits heretofore marked for Identification, namely, letter from Schenley to Stone, 11/1/45 re the 1945 Franciscan contract, Petitioner's Exhibit Number 24 for Identification; letter from Schenley Distillers Corporation by M. J. Nauheim, Vice President, to R. I. Stone, dated December 5, 1945, Petitioner's Exhibit Number 25-A for Identification; letter from Franciscan Farm and Livestock Co. [713] by R. I. Stone to Schenley Distillers Corporation, dated October 13, 1947; Petitioner's Exhibit 25-B for Identification, contract

(Testimony of Earl Johnson.)

made and entered into this 13th day of October, among Schenley Distillers Corporation, Franciscan Farm and Livestock Co., and R. I. Stone.

Mr. Fisk: I would like to make my objections separately, your Honor. I don't think the documents are related. As to Petitioner's for Identification 23, I would like to object to it on the ground it is irrelevant, incompetent and immaterial; there is no proper foundation laid to show the execution or delivery of the document. It purports to be on its face——

The Referee: Pardon me, gentlemen, Petitioner's Exhibit No. 23 is in Evidence.

Mr. Walsh: I don't think so, your Honor. Yes, it is, 351—just a minute.

Mr. Fisk: It was withdrawn from Evidence, page 368.

Mr. La Shelle: Your Honor, can I make a statement there?

Mr. Fisk: I can tell you what the statement was, I can tell you from recollection. What happened is, the document was offered in Evidence, and an objection was raised by us on the same ground that I am raising now, and the Court said, "Well, I don't know anything about signatures. There is nobody's signature that has been identified, or anything of that kind," and Mr. La Shelle then withdrew his offer as [714] to Franciscan documents. He did put in the Hedgeside documents. These are all Franciscan. This is an agreement between Stone and Schenley.

(Testimony of Earl Johnson.)

Mr. La Shelle: Your Honor, may I be heard on that, because it is directly contrary to what Mr. Fisk states.

The Referee: We are now just talking about 23.

Mr. La Shelle: 23, yes. My understanding of 23 and my understanding of this, without being in any way binding on anybody, is my personal belief that this was marked in Evidence in error. I might state there are so many things here that you could easily make a mistake as you go along. That's my recollection.

Now, my recollection is further, and I am very definite on this point: These were all qualified at the same time as the Hedgeside documents were, and Mr. Woolsey was on the stand, identifying his signature; he identified Nauheim's signature, and he identified Stone's signature, and Stone having signed some of the documents in his presence and was thoroughly familiar with his signature. On the basis of that testimony, the Hedgeside documents went in Evidence with little or no objection. I think objection was made and it was overruled. The exact type of testimony as to the signatures, execution of those documents, was the same as Hedgeside. There was some objection made to it at the time. My recollection was that the Court said something in the way of an informal objection, in any event, the Court [715] made a remark that "I don't know anything"—at the time it wasn't particularly important to me, and I said, "Well, we'll mark them for Identification for the time being and come to that later".

(Testimony of Earl Johnson.)

But I do believe this was marked in Evidence in error. I think that they were all marked, supposed to be marked that other way.

The Referee: Mr. Ward, can you help us?

Mr. Ward: Shall we go off the record?

Mr. Fisk: I want to read this, page 356 of the record: (Reading):

“The Referee: The objection is overruled. Number 23 for Identification, Number 23 in Evidence.

Mr. Fisk: Your Honor, I want to make an additional objection to this contract, in that it is not in anywise tied up to these matters. Here is a contract by R. I. Stone, individually, and Schenley Distillers, dated November 1, 1945, and I presume we have a witness here that is going to say he doesn't know anything about the contract except that those are his signatures; so I think we are entitled to have Mr. Nauheim come, if you are going to offer this in Evidence, to tell us something about it.

The Referee: Now, Mr. La Shelle, can you explain [716] to the Court how Hedgeside Distillery is affected by this document by the Franciscan Farm and Livestock Co.

Mr. La Shelle: Because there is Franciscan whisky involved here. The Heaven Hill whisky was produced at Franciscan.

The Referee: My question is this: Is R. I. Stone signing this agreement on behalf of Franciscan Farm and Livestock Co., or is he signing it on behalf of Hedgeside Distillery?

Mr. La Shelle: It says here, your Honor, please

(Testimony of Earl Johnson.)

that 'You, as an individual, doing business as Franciscan Farm and Livestock Company, are the owner and operator of a wine and fruit distillery at or near Napa.' In other words, this is a contract between Schenley on the one hand, and Stone as an individual on the other; and at that time, he was doing business under the firm name of Franciscan Farm and Livestock Company. This is entirely a different deal, and some of the Heaven Hill whisky, I am not sure, was produced—not the Heaven Hill whisky, but there was a contract in existence at that time——

The Referee: At this time, right now, is there anything before this Court that proves the statement that you have just made? [717]

Mr. Fisk: Not according to Mr. La Shelle's argument this morning.

The Referee: In other words, how was the Trustee at Hedgeside concerned or affected with this document?

Mr. La Shelle: Well, let me take a look at that Hedgeside for a minute.

The Referee: Of what?

Mr. La Shelle: Schedule C, the big, main one.

Mr. Walsh: Do you want my copy here?

The Referee: Here is 'B'.

Mr. La Shelle: 'B' is what I want."

I won't read the other; you can read it, if you want to.

"Mr. Fisk: He hasn't laid the proper foundation for the introduction in Evidence of this document.

(Testimony of Earl Johnson.)

The Referee: Well, Mr. La Shelle's statement is that, without proving his whole case all at one time, he certainly can identify this signature by Mr. Woolsey, as far as the signatures are concerned, as far as the execution is concerned. My point is there is nothing before the Court as yet that would bind the Trustee on this Petition in Reclamation because of any agreement that Stone had as an individual, or that Franciscan Farm and Live-stock Company signed with Schenley. At the moment, there is not. [718]

Mr. La Shelle: Well, we will show that these spirits here, warehouse receipt number 3381, 3407, on page 2 of Schedule C, I forget the Identification number at the moment, were produced under this contract entitled—by reason of that contract. As I stated, I can't do it all at once. In other words, we show that we made a contract with 'A'. 'A' happens to be Franciscan. He produced the spirits we bought, and we paid for them, and they were stored at Hedgeside, which is showing their title.

The Referee: Well, now, technically, Mr. La Shelle, your document, although it is marked for Evidence, the Court can take care of that in a moment, if I so desire. Why would you be prejudiced in the least if it still remained for Identification, and Mr. Woolsey has identified the signature, and then the evidence that you are talking about that you are going to introduce through Mr. Johnson at a later date here, then, at that time if you have

(Testimony of Earl Johnson.)

offered the proper testimony, et cetera, then it would be admissible.

Mr. La Shelle: Well, it is simply this, Your Honor. Here is a contract with Stone, and here is—As a matter of fact, there, which comes first, the cart or the horse? [719]

Mr. Fisk: It's obvious which comes first here.

The Referee: But still, isn't it the same for this document to do you any good whatsoever, whether it is in Evidence or marked for Identification, or anything that you want to call it, it is of no use whatsoever until you tie up Stone or the Franciscan with this bankruptcy proceeding here; isn't that true?

Mr. La Shelle: Well, I'll tie it up with the evidence here.

The Referee: You haven't got it yet.

Mr. La Shelle: No, I can't do it all at once.

The Referee: That is why I am saying, why don't you offer that document?

Mr. La Shelle: If the Court prefers to do it that day, it's all right with me.

The Referee: Well, Counsel here has made an objection that there is not the proper foundation, and as long as the objection is not before the Court—

Mr. La Shelle: It's all right. It has been identified by Mr. Woolsey as the signatures, and, as I say, we can't do it all at once. You can remark it for Identification.

Mr. Fisk: It's wholly immaterial at this time until it's connected up.

(Testimony of Earl Johnson.)

The Referee: The document, Petitioner's Exhibit 23 [720] for Identification, as of November 9, 1949, and a few moments ago received in Evidence, is not received in Evidence at this time, and is Petitioner's Exhibit Number 23 for Identification".

Mr. La Shelle: All right now, here is my position. Mr. Woolsey, it will be shown in other parts of that transcript, positively identified Mr. Nauheim's signature of that as an executive officer of Schenley's. Mr. Nauheim can't add anything to the picture. One man can qualify another's signature as he knows it. Now, this contract is a contract between Stone as an individual doing business, and Franciscan, five years ago. We will show, and I make the Offer of Proof now, that during the time that contract was in effect, invoices and sight drafts credited through the New York bank were paid by Schenley warehouse receipts, were delivered pursuant to the method set up in this contract. Then they became later stored at Hedgeside.

Now, we're not claiming that Hedgeside was a party to that agreement. We are simply showing that we bought certain goods. Those goods, unfortunately, are stored at Hedgeside, and we are petitioning to reclaim them. We might have had a contract with Joe Doaks in New Orleans.

The Referee: Well, Mr. La Shelle, let me interrupt you again. Let's stay on the one proposition, namely, the offer of Petitioner's Exhibit Number 23 for Identification [721] in Evidence. Do you feel as though you're in any better position today than you

(Testimony of Earl Johnson.)

were on November 9, when Mr. Fisk has just read the testimony from that particular hearing, as far as the Court receiving it?

Mr. La Shelle: I'll qualify that by saying this: I feel that it should have been admitted in Evidence in the first place, and that I don't need to be in a better position. But by the Court's own theory of the case, I have now shown by this witness that a basic document in support of payment of goods, to start with, at the very beginning is the contract, and we have had a lot of testimony about it today and last week. Now, here is a basic contract which provides for payment by sight draft in a certain way with this man, and warehouse receipts in this, to be delivered——

The Referee: Yes, but who was the contract between?

Mr. La Shelle: Well, it says it right here?

The Referee: Yes, it does.

Mr. La Shelle: It says so right here:

“You represent that you as an individual, doing business as Franciscan Farm and Livestock Company, the owner and operator”——

and so forth. It's a letter contract, and it's signed, “Accepted by Stone.”

The Referee: Where does Hedgeside, the Bankrupt, fit into the picture?

Mr. La Shelle: Because the goods that were sold under [722] that contract happened to be in storage at Hedgeside. That's all. They might be in storage some place else. We might have made a contract

(Testimony of Earl Johnson.)

with "A" in New Orleans, and stored it in there. The Trustee is claiming, somebody else is claiming it, but we have got the right to show what our claim is based upon.

We are not saying that Hedgeside has a notice of that. We are not trying to introduce that as notice to anybody. We are introducing that as saying we have got a contract with "A". "A", under this contract, sold us goods, and here is our evidence of title and shows our payment.

The Referee: Yes, but still, let's get back to this document. Why wouldn't you be just as well off to furnish the Court with a copy of a contract with a company, Roma Wine Company and the Cresta Blanca, and somebody else?

Mr. La Shelle: Yes, but that's an inter-office deal.

The Referee: My point is, show me where this document is connected with the Bankrupt.

Mr. La Shelle: Because we are showing, or attempting to show, title to certain property, that this contract under which we bought it, and that we made payment for it.

The Referee: Yes, but have you looked at the names of the contracting parties?

Mr. La Shelle: Yes. We are not claiming that Hedgeside sold this goods.

Mr. Fisk: Who are you claiming sold the goods?

Mr. La Shelle: Sold as an individual.

Mr. Fisk: You're claiming that, under these

(Testimony of Earl Johnson.)

documents you put in here, the portion was sold to you by Stone as an individual, is that right?

Mr. La Shelle: That's right. But Stone as an individual, and he wasn't even operating at Hedgeside. And later on, as it states here, "this contract is made to you as an individual, but it is agreed by us that you are now completing the formation of the Corporation and the conveyance of certain properties thereto as planned, and that this contract, although made with you as an individual, is to be assigned to said Corporation upon the formation thereof, and that, in such case, you, as an individual, will no longer be liable under the terms, and for any breach of this contract."

Mr. Fisk: I don't think it's necessary to read that——

Mr. La Shelle: Wait a minute, the second contract on October 13, 1947, with Franciscan was following it as a Corporation. Now, we are introducing invoices from Franciscan. We bought this. Now, we are not trying to say that that was sold to us by the Bankrupt. Our only claim in connection with this merchandise is this: Hedgeside took, as a warehouseman, certain stuff in there that we claim is ours. You will not deliver it, so we petition in bankruptcy for its deliverance. It might have been just that we bought from somebody in Boston. We are entitled to show, insofar as we [724] can, how we came to acquire that stuff. As a matter of fact, we've got to do it.

Now, we're not trying to bind the Bankrupt Es-

(Testimony of Earl Johnson.)

tate as a party to this contract. But the Bankrupt Estate, through the Trustee and his attorney, says: "Well, you set up these barrels and that they belong to you. How did you acquire them? What proof have you got that you bought them?" And we're going to do it, and there is only one way, one way to do it. We have a contract with "A", he sold us the stuff, we bought it, and we stored it with you.

Now, your legal problem that arises out of those facts, that's something else again.

Mr. Fisk: At least, there is nothing in this record up to the present moment to show through any kind of method that Schenley has purchased and paid for any goods, wares or merchandise of any kind or character from R. I. Stone, unless Counsel is willing to stipulate that R. I. Stone was both Hedgeside and Franciscan. If he's willing to stipulate to that, I will let the contract go in Evidence.

Mr. La Shelle: I won't make any such stipulation. We contend directly to the contrary.

Mr. Fisk: But he has got nothing to show that he has bought any goods, wares, or merchandise on the face of the document from Stone. Therefore, this contract is wholly irrelevant, incompetent, and immaterial, and hasn't [725] been connected up to this proceeding.

Mr. La Shelle: Here is the situation, Your Honor: We can't put in everything at once.

The Referee: Off the record.

(Discussion off the record.)

The Referee: Back on the record. Mr. La Shelle,

(Testimony of Earl Johnson.)

you have furnished the Court with four original Exhibits, marked for Identification, and you made some statement with reference to furnishing the Court with photostatic copies.

Mr. La Shelle: I'll look them over tonight, and in the meantime, I suggest the Court retain the originals.

The Referee: Let the record show, then, that Mr. La Shelle has turned over to the Court the originals, Petitioner's Exhibit 23, 24, 25-A, and 25-B, all for Identification.

Mr. Fisk: And may the record show, I think it does, that we have an objection to be entered to the other three documents that are offered, but I think they should be treated with separately, and at the present time I have entered an objection to 23 for Identification.

The Referee: Very well.

* * * * * [726]

EARL JOHNSON

previously sworn, resumed the witness stand and testified further as follows:

Further Direct Examination

Mr. La Shelle: Q. Mr. Johnson, I'll hand you the originals of what purports to be warehouse receipts numbers 3381-B, 3383-B, 3384-B, 3385-B, 3392-B, 3393-B, 3398-B, 3399-B, 3400-B, 3402-B, 3403-B, 3407-B, which are the first group of warehouse receipts on the top of Schedule——

(Discussion off the record.)

(Testimony of Earl Johnson.)

Mr. La Shelle: For the benefit of Court and Counsel, the group that I have here is this group right here.

The Referee: Referring to——

Mr. La Shelle: I think that is 34; no, that's my office copy. I think it's Petitioner's Exhibit Number 34.

Mr. Walsh: 34 for Identification.

The Referee: That's 34. That's merely showing the Schedule.

Mr. La Shelle: Yes.

The Referee: But what Exhibit are you referring to for Identification, with reference to the warehouse receipts? [758]

Mr. La Shelle: It's that group—30, I think.

The Referee: So we are referring to Number 34 for Identification as a guide, and in the testimony Mr. Johnson is referring to Petitioner's Exhibit Number 30 for Identification in your examination.

Mr. La Shelle: That's right. And as a guide, it's the first group of warehouse receipts on the left, the numbers that I just read off.

Q. Mr. Johnson, I show you here those warehouse receipts in that group that I just read off, and for the purpose of the questions which I am now going to ask you, except for the purpose of Identification, I am not questioning you about the warehouse receipts themselves; I say that for the benefit of Court and Counsel, as they will be authenticated by another witness. Now, with reference to these warehouse receipts and these documents that

(Testimony of Earl Johnson.)

are pinned to them, did you assemble those at the request of Mr. Woolsey of Schenley?

A. Yes, I did.

Q. And with reference to the supporting documents, that is, these documents outside of the warehouse receipt, where did you get the supporting documents?

The Referee: What is that, Mr. La Shelle? Where?

Mr. La Shelle: Where did you get them?

The Witness: I'll have to inspect them.

Mr. Fisk: Just a minute, I'll object to that as calling for the conclusion of the witness as to what are [759] supporting documents.

The Referee: That part may go out. Where did you get the documents that you have?

Mr. Walsh: And for the purpose of the record, I think he should identify them.

The Referee: Identify the documents, and then tell us where you got them, and leave your conclusion out as to whether they are supporting documents.

Mr. La Shelle: Instead of using the word "supporting," supposing I use the word "attached documents"?

The Referee: As far as that statement is concerned, Mr. La Shelle, that will be in order, but in answer to Mr. Walsh's suggestion, we should have the documents identified that he is going to testify about.

(Testimony of Earl Johnson.)

Mr. La Shelle: All right, take the first warehouse receipt 3381.

The Witness: 3381-B.

Mr. La Shelle: There are certain documents attached to that, are there not?

A. That's right.

Q. And will you enumerate what those documents are, or what they purport to be?

A. The first document attached is a cancelled check in the amount of \$2,584.39, check number SB-90391, drawn to the order of the National City Bank of New York. That check was obtained by myself upon the request from our New York office, Internal [760] Audit Department.

Q. What is the next one?

A. The second document is a copy of a voucher, Schenley Distillers Corporation, number SB-90391, in amount of \$2,584.39, showing payment to the National City Bank of New York. That was obtained from the Accounts Payable Department, New York office, upon my request.

Q. May I interrupt there for a moment? Is that what you call a voucher copy of a check?

A. That's right.

Q. In other words, the check is a copy of the top part?

A. The check is the original; the voucher is a copy.

Q. I see. All right.

A. Third, attached is a copy of a draft, dated March 30, 1947.

(Testimony of Earl Johnson.)

The Referee: March what?

The Witness: March 20, 1947, furnishing information, 15 days from above date, pay to the order of the American Trust—

The Referee: The draft is the best evidence.

Mr. Walsh: Well, Your Honor, please, just identify it.

The Referee: Sustained. Just identify it.

The Witness: Do you want the amounts?

The Referee: Just identify the document, because the draft itself is the best evidence.

The Witness: It's drawn for \$2,584.39; the fourth [761] document is an invoice received from Franciscan Farm and Livestock Company—

Mr. Walsh: Just a minute. I ask that last statement go out.

The Referee: Sustained.

Mr. La Shelle: Just state what it is.

A. It's an invoice, with heading Franciscan Farm and Livestock Company, in the amount of \$1,228.56.

The Referee: Invoice number 141.

The Witness: Invoice number 141. The next is, numerical order, is an invoice with the subheading, Franciscan Farm and Livestock Company, invoice number 140, in amount of \$1,355.83; and last is a copy termed, Accounting Distribution, reference number 3-903—I don't know whether that's 81 or 91—in amount of \$2,584.39.

Mr. La Shelle: Q. Now, with reference to the remaining warehouse receipts, I notice that—

(Testimony of Earl Johnson.)

The Referee: Mr. La Shelle, for the purpose of clarity, with reference to the remaining warehouse receipts from 3381-B to 3407-B, as shown in Petitioner's Exhibit for Identification Number 34, in all the remaining—

Mr. La Shelle: Oh, yes, of this group, I mean.

Q. With reference to these documents that you just mentioned, the warehouse receipt number 3381, I think you told us where you got the cancelled check; where did you get the rest of the documents?

A. The remaining documents, or documents following the cancelled check, were obtained on my request from the New York office, Schenley Accounts Payable Department.

Mr. Walsh: Now, just a minute, Your Honor please. I ask that last statement go out, in the Accounts Payable Department. There is no evidence in the record—

Mr. Fisk: I join in that.

Mr. Walsh: —that these came from the Accounts Payable Department.

The Referee: Well, I will sustain the objection, Mr. Walsh, and to clarify the matter, where did the voucher come from, where did you get it?

A. From the New York office.

Mr. Walsh: Now, just a minute, if Your Honor—

The Referee: Where did you get it yourself?

A. From the mail.

Q. Who made the request for it?

A. I did, I believe. There were a number of

(Testimony of Earl Johnson.)

documents which were received directly on my request; there were some few documents which were obtained by Mr. Woolsey on his request. I don't recall exactly which ones were——

Q. Well, you see, now, Mr. Walsh raises the question here. You did testify as to where the check came from, and as I recall it, you also testified about the warehouse receipts. Now, in addition to that, we have a voucher, we have a sight draft, we have what purports to be invoice number 141 and [763] invoice 140, so when you say the other documents came from New York or some place else, Mr. Walsh wants to know where those other four documents came from, or at whose request, or all about it.

A. All of the documents in support of payment——

Q. Well, now, just a minute. Pardon my interruption, Mr. Johnson——

Mr. La Shelle: Q. Never mind support; the documents attached. Use the word "attached."

A. All of the documents attached to warehouse receipt number 3381-B, with the exception of the cancelled check, were obtained through the mail after I had requested that they be submitted to me from our New York office. They were all attached. They were all part of one file attached to this voucher copy.

The Referee: The originals or the photostatic copies, or what?

(Testimony of Earl Johnson.)

A. I am talking about the originals now. The originals as attached to the original 3381-B.

Mr. Walsh: May I make a statement for the record?

The Referee: Yes, Mr. Walsh.

Mr. Walsh: Your Honor, please, if what the witness states is true, there should be the letter of request and the letter of transmittal from the New York office showing that.

The Referee: How was your request made, Mr. Johnson?

A. There were a number of requests, because some of these were [764] gotten at different times as I built the schedules, some of my first requests were by telephone, some of my requests were written or letters with copies to the Chief Accounting officer in New York and copies to the Accounts Payable Department.

Q. Did you send the letters to New York?

A. I sent the letters, yes.

Q. Do you have copies of the letters where you requested certain documents?

A. I don't believe I have those with me.

Q. But do you have them?

A. I do have copies of those letters, yes.

Q. As Mr. Walsh suggests, do you have letters of transmittal from the New York office back to you, enclosing certain documents?

A. In some instances. I don't know whether I have them in all instances or not. Some of these were obtained in rush and just enclosed, and they

(Testimony of Earl Johnson.)

were sent to me air mail, special delivery, on my telephone request.

The Referee: Mr. La Shelle, will you have Mr. Johnson—will he be finished with his testimony—

Mr. La Shelle: Today?

The Referee: Well, Mr. Walsh and Mr. Fisk will still have an opportunity to get at him, so to speak, in further hearings.

Mr. La Shelle: He'll not finish today, I'll guarantee that. [765]

The Referee: As long as you are guaranteeing things, will you also guarantee to the Court and Counsel that you will have Mr. Johnson furnish letters where he requested documents of the New York office, and letters of transmittal from the New York office back here?

Mr. La Shelle: I will do so, if the Court instructs me. I don't think they are competent for this reason. The witness has already stated under a long voir dire and also direct, that he knows where these documents should be preserved and he went there and he got them. I don't say that he went there personally, that he looked for them there, requested them, got some of them out here locally, himself, and the rest in New York. These were original documents. They speak for themselves. As a matter of fact, I question whether it's of any particular importance that there be any qualifying evidence about them, because the cancelled check and the original invoices and cancelled drafts here speak for themselves. They are what

(Testimony of Earl Johnson.)

they purport to be. If the Court instructs me to have those here, what we have, we will be glad to produce, but I object to the fact that—I do not think they are competent or even necessary in this case.

The Referee: Well, they are not being offered, Mr. La Shelle, but Mr. Walsh has just made a comment to the effect that Mr. Johnson requested certain documents from New York, that there must be a request. Now, Mr. Johnson said that, [766] in some instances, the request was by 'phone; others, it was by mail. He said that he did make certain requests by mail—did you, Mr. Johnson?

A. Yes.

The Referee: And in those instances, you said that you do have copies of your letters of request, but you do not have them with you, is that correct?

A. Yes.

Q. And you also stated, when I asked you, that in some instances, when these documents were forwarded from the New York office to the West Coast office, that there was a letter of transmittal from the New York office back here to you, is that correct?

A. That's right. I can't tell, of course, how many or how many instances were by telephone or otherwise.

The Referee: I am not asking you to do that, Mr. Johnson. Even if you made a search and only found one or two, I am not saying anything about that. But prior to the next hearing, you make a

(Testimony of Earl Johnson.)

search of the copies where you requested documents, and also the letters of transmittal, which will be originals from the New York office; so that Mr. Walsh and Mr. Fisk will have an opportunity to examine those letters. No one is passing at this time whether they are admissible or not admissible, but Mr. La Shelle has said to the Court that he is not concealing anything. He wants them to have the full picture. Now, Mr. Walsh, you may go on.

Mr. Walsh: You have answered my question by your statement.

Mr. Fisk: Well, if it will add anything to the proceeding, I will state that the documents are not being offered in Evidence, I understand, Counsel. But the way to introduce documents that are records of a corporation, as I insist that these are, that is some of them are, is by the custodian of the records. This witness has admitted he is not a custodian of the records.

The second thing is, there is nothing in this record that shows either the mode of preparation or the time when they were paid under the Business Entries Rule that is required before evidence of this character is offered.

Mr. La Shelle: May I suggest there is nothing before the Court?

Mr. Fisk: I am saying—introduced my statement with the fact that I am making this objection now.

Mr. La Shelle: I don't want to have my exami-

(Testimony of Earl Johnson.)

nation interrupted. There is nothing before the Court.

The Referee: Yes, there is, Mr. La Shelle. Mr. Walsh made a request, and the Court has instructed the witness to do certain things.

Mr. La Shelle: That's the end of it.

The Referee: No, it isn't. At the same time of the interruption, when I interrupted you and Mr. Walsh, Mr. Fisk is also commenting on this proposition. Now, I anticipate [768] what you are going to say, but Mr. Fisk has an opportunity to complete his statement.

Mr. Fisk: The purpose of my statement is this: A question arose as to whether or not proof of the character requested would be requested here, and I say, in the interest of saving time, that when these are offered, if they are offered I am going to make those objections, if Counsel relies on this kind of testimony to get them in. That's the purpose of my statement.

The Referee: Mr. Fisk, isn't this a fact, that prior to Mr. La Shelle calling our attention to this Exhibit, that sets for the warehouse receipts and all the pertinent information that he considers pertinent in Petitioner's Number 34 for Identification, and prior to going into either 30 or 31 for Identification, he said, "I am not offering these Exhibits at this time; I have another witness for that purpose." Is that correct?

Mr. La Shelle: That was with respect to the warehouse receipts, and some of these others, these

(Testimony of Earl Johnson.)

letters changing warehouse receipts. There will be other witnesses to authenticate warehouse receipts and the letters in which they were changed.

Mr. Fisk: The purpose of my statement was simply when, as, and if, these documents are offered in Evidence, if they are offered with this kind of a background, I don't want it said to me at that time that when I had an opportunity [769] to request the documents that would support his position I said nothing. Now, I am simply saying that, if they are put in or attempted to be put in that way, I am going to make an objection on that ground. Now, if it has no relevancy, why, then that's—

Mr. La Shelle: If something is to be done, I will do something—

The Referee: Mr. La Shelle, I think Mr. Fisk is making a new request. He doesn't want to prolong the discussion here or your case at this particular time, but he doesn't want to, in his silence, he doesn't want to be precluded at a later date by having you say, "Well, the time for you to make your objection was when Mr. Johnson was on the stand and when we were talking about Petitioner's for Identification Exhibit Number 30 and 31.

Mr. La Shelle: That will be understood, then.

The Referee: Very well.

Mr. La Shelle: Q. Now, Mr. Johnson, on the 3 of this group, I notice that there are some warehouse receipts, to which there is nothing attached, other than a small, pencil memorandum.

(Testimony of Earl Johnson.)

A. That's right.

Q. And is that memorandum in your — did you make those memoranda?

A. In most instances, I made them. I was working with one of my men, a man who works for me, and in some instances I had him prepare the memorandum as I called it to him, so [770] there will be other writing in there. I prepared them in effect.

Q. What I am getting at is this: Will you explain to the Court, in assembling this group here, on warehouse receipt number 3381, there are two invoices, one cancelled draft, and one cancelled check; I want you to explain to the Court how and why you grouped these together, and why on the next warehouse receipt there are no attached papers, other than that memorandum—just so that you can explain it to the Court how they're grouped.

A. Well, each warehouse receipt calls for a certain specified number or quantity of barrels, with certain serial numbers pertaining thereto. In assembling the data, I attempted to take the invoices which covered payment for the serial numbers shown on the warehouse receipt, and attached them to that particular warehouse receipt.

However, it was found that in some instances, one invoice would have more barrels, and it would be necessary to cross-reference certain barrels to other warehouse receipts. And I couldn't attach one invoice to more than one warehouse receipt, so that

(Testimony of Earl Johnson.)

after completing what I thought were the first documents in a series, as I came across warehouse receipts where the documents were in the previous attachment, I made a little reference note, referring to the previous warehouse receipt, showing that the documents in support were attached to the preceding warehouse receipt number and referring [771] to the serial numbers which appeared on those attached documents.

Mr. Fisk: Your Honor, I am going to move to strike out the witness' testimony, because here is an attempt to put in a self-serving, written document, prepared by this witness—for the purpose of this proceeding to put it in as testimony in this case. And I submit that is not the way to introduce evidence, and his testimony in that regard should be stricken.

The Referee: Well, Mr. Fisk, unless I did not understand the witness, in effect, what he is saying is that, even though he does have an original warehouse receipt without certain other documents as he would have in 3381, nevertheless the other documents that are a part of this next warehouse receipt that Mr. La Shelle asked him about are here, but they, of necessity, cannot be attached to all of the warehouse receipts at once. They're attached to one warehouse receipt, and not all of them; is that—

Mr. La Shelle: That's it, exactly.

The Referee: But the documents are here, re-

(Testimony of Earl Johnson.)

ardless of what warehouse receipt they're attached to.

Mr. La Shelle: That's right. In other words, it is simply an explanation, so that the Court can check the serial numbers and see what the documents are that are supporting them, because if you have one invoice covered by two warehouse receipts, obviously you can't attach one invoice to two things.

Mr. Fisk: I submit that with these documents is a small pencil memorandum, made out by this witness. There is one with each set, or most of the sets, at any rate. I submit that it is not a proper method of introducing in Evidence at a proceeding for a witness to sit down in advance and write out what connection the various documents are that may be offered in a proceeding, and then offer testimony in the proceeding and testify to it, and put it into the record. I submit it is improper in every manner, shape and form.

The Referee: Well, Mr. Fisk——

Mr. Fisk: It's a matter for argument of Counsel.

The Referee: I think that Mr. La Shelle would be willing that pencil or pen memorandum go out, the only reason he has it in there is so the Court, when this matter is finally submitted, instead of groping through all these documents to find out where are the documents that apply to warehouse receipt number so-and-so, that he has a pencil notation in there, and take a look at it, so-and-so——

Mr. Fisk: That is a matter for Counsel to pre-

(Testimony of Earl Johnson.)

sent in his argument to the Court. It is not a matter for the witness to testify to on the stand.

Mr. La Shelle: If it please the Court, those are offered for the sole purpose of the Court's convenience, and also Counsel's convenience, by way of an index to the Court, so that the Court can follow, just as you said, the Exhibits. [773] It is unfortunate that the transactions of business natures of this kind, when warehouse receipts sometimes cover five or six invoices and then go on to another warehouse receipt. I am only trying to make the Court's job easy. I am certainly not relying on this pencil memorandum to make my case, and will so stipulate.

Mr. Fisk: The witness need not testify into the record regarding it. If he wants to submit that later, that's all right, but to testify into the record as to what these documents are and how they were prepared, and what they purport to hold, is not proper testimony.

Mr. La Shelle: I submit that it is, for the purpose for which it is offered.

Mr. Fisk: I submit my motion.

The Referee: Well, in the light of Mr. Fisk's objection, the Court will have to sustain it, and in sustaining it when this matter is finally submitted the Court will have to go groping through all of these other documents, which I am willing to do. I understand the problem, Mr. La Shelle, and I understand that one warehouse receipt may be connected with certain other, as you call them

(Testimony of Earl Johnson.)

supporting documents, and if they don't want those pencil notations in there, they certainly are not original documents. Some of them are made by Mr. Johnson for the help of the Court and you and I, and some of them are made by someone under his direction. If Mr. Fisk doesn't want them in there, take [774] them out.

Mr. Fisk: If Your Honor please, I don't want the Court to think for one moment that I want to put any undue burden on the Court in going over these records because it is going to be a burden. On the other hand, I have got to have some protection from the standpoint of my client, and I submit that this method of testifying in a case is wholly improper, and the same thing can be accomplished in a proper way, so the Court will not have that burden without attempting to put it on through the witness at this time. I mean, it's purely a mechanical problem that Mr. La Shelle can get from Mr. Johnson on the outside and explain to the Court in whatever form of briefing he wants to.

The Referee: Mr. Fisk, I sustained your objection.

Mr. La Shelle: I ask, Your Honor, that it's recess time. I would like Your Honor to reserve ruling on that, because I think I have a case here that I will get during the recess that will solve this problem.

The Referee: We will have a recess.

(A brief recess was taken.)

After Recess.

(Testimony of Earl Johnson.)

Mr. Fisk: If your Honor, in regard to the matter before the Court at the close of the last session, if the Court feels it gets any benefit out of that testimony, I'll withdraw my objection, provided it is with the understanding [775] that at some later time I think that it is used to an extent that is objectionable from my client's point of view, I will be in a position to object. However, I say it's in the interest—I think I am correct in my objection, but in the interest of seeing that the evidence is before the Court, that the Court has the full benefit of what he wants in the proceedings, I'll withdraw it at this time.

The Referee: Well, Mr. Fisk, I thank you seriously for the withdrawal of your objection, but even in the face of the withdrawal the Court is still of the opinion that it is not admissible, and that Mr. La Shelle can cover the same point with reference to informing the Court as to where to look for what the Petitioner contends are supporting documents, in a statement to be made by him, and the Court is sustaining the objection.

Mr. La Shelle: Well, may it please the Court, I would like to cite this case to the Court.

The Referee: Very well.

Mr. La Shelle: Which I think the Court will find of some help in the premises, and which I think is directly in point. It's the case of *U. S. versus Mortimer*, 118 Federal Reporter, 2nd Series, at page 266, in which it was an action for using the mails to defraud a criminal prosecution, and in that case

(Testimony of Earl Johnson.)

an accountant had introduced a number of charts and tables, showing these transactions, and at page 269, in Syllabus 6 and 7, it states: (Reading): [776]

“The most serious objection, technically, is that made to the admission in evidence of a number of charts purporting to show defaults in the payment of taxes on a high proportion of the mortgaged properties. These charts had been prepared by the prosecution witness Karcher, an experienced public accountant, assisted by several aides, of whom only one, in addition to Karcher, took the stand. One more seems to have been in the courtroom; the others were outside the district and at a distance at the time of the trial.”

Then, I am reading further from the bottom of what I consider to be the pertinent parts here:

“The voluminous material summarized by the charts was itself extracted from a great number of tax record books of each of the metropolitan counties. Not only would the production of those books have been a practical impossibility, but the procurement of either certified copies or title company abstracts, as authorized by the New York Civil Practice Act, Sec. 382, 385, of those records, involving hundreds of procedures of land, would have been most expensive, as well as disruptive of the activities of the record offices and burdensome upon the Court. * * * But appellant argues most strenuously that all of Karcher’s aides should have been called.”

The Court then goes on to state that that was un-

(Testimony of Earl Johnson.)

necessary, that he supervised and that his testimony is enough. They say here:

“There are numerous cases holding admissible on the testimony of a supervising agent statements compiled from voluminous records according to a method at once practicable and offering reasonable guaranty of accuracy, even though the supervisor had not examined each record himself.”

And then we come here to the most important part, which I believe is directly at point in this case. They cite cases to that effect and then they say:

“The only possible reason for asserting that these authorities are not quite controlling is that these cannot be business entries, since they were made in preparing evidence for this trial, and, indeed the case of Morton Butler Timber Co. versus United States (giving the citation) does say as a ground for affirming a ruling made below, that entries ‘made apparently for exclusive use as evidence in this case’ were, therefore, not in the regular course of business. This ruling is, however, condemned by Wigmore as ‘unsound’; the men who made them were acting in the regular course of their employment.”

5 Wigmore on Evidence, and so forth. [778]

“And it is opposed to the leading case of Northern Pacific Railroad Co. versus Keyes, *supra*, where the tables in question were prepared for the particular case.”

Now, we have these little notations, although

(Testimony of Earl Johnson.)

each one is a separate piece of paper, attached to a warehouse receipt that doesn't have an attached document; they are put together, a table and a chart, prepared by this witness and under his supervision, for the purpose of indexing this evidence; and under the authority of that case, not only are they admissible but these charts themselves are admissible. I am not offering these at this time, because I am not through with them, but I submit to Your Honor that that little index there is a guide to the serial numbers and barrels and warehouse receipts and invoice numbers and checks, so that you can check them, that it is a part of a chart and table prepared by this witness in exactly the same manner as that case, and it is therefore admissible in Evidence.

The Referee: Mr. La Shelle, that isn't the way I understand your reading that case. I'll go further. We have the evidence in here already, according to your case, if you are going to prove it. Those charts in there, or that other memorandum was based upon——

Mr. La Shelle: Well, yes, in this particular case.

The Referee: You have already, according to you, [779] you have the documents here.

Mr. La Shelle: We are offering a lot more than they offered in that case.

The Referee: But you have the documents here before the Court.

Mr. La Shelle: That's quite right, and we are just trying to give the Court an aid and an index

(Testimony of Earl Johnson.)

of reading those documents, as you said, so if there is nothing to this, there is a little note saying where you will find it. Now, I submit, particularly in view of Mr. Fisk's statement withdrawing any objection to that, that those should stay in there, because it is much easier for the Court.

Now, I am not going to be looking at these in my briefing; you are going to be looking at these in your briefing.

The Referee: I want to ask you a couple of questions, Mr. La Shelle, and you are not on the stand.

First of all, isn't it a fact that either the original supporting documents or photostatic copies thereof, of the original documents, either have been introduced for Identification or Evidence, or——

Mr. La Shelle: And will do so.

The Referee: And will do so, isn't that true.

Mr. La Shelle: That's right, dead right.

The Referee: Number two, the memoranda that were prepared were by Mr. Johnson, or by someone under his supervision, [780] will merely refer to those original documents, or photostatic copies thereof, is that true?

Mr. La Shelle: That's true, that's very true.

The Referee: So the only purpose whatsoever— Pardon me, before I make that statement. And by your own admission, the only reason that you want to offer these memoranda is as a guide to the Court, but not to be considered in any way as evidence?

(Testimony of Earl Johnson.)

Mr. La Shelle: Yes, they're a guide to the Court. They're an index, is all they are.

The Referee: But not as evidence?

Mr. La Shelle: I certainly wouldn't want to rely on them.

The Referee: Well, now, answer my question now: Is it merely as a guide to the Court? Let's just use that as an example?

Mr. La Shelle: May I offer this as a suggestion? Assuming for the moment that the original documents go in Evidence, we can solve this problem by having it understood in the record that those pencilled, little memoranda like that are simply for Identification and not Evidence.

The Referee: Well, then, if they're only for Identification, then I don't suppose that Counsel will have any objection?

Mr. Walsh: I have no objection.

The Referee: Mr. Fisk? [781]

Mr. Fisk: Your Honor, I have already withdrawn my objection. I don't want to gild the lily, but I can't see, for the very reason that the Court has outlined, how the case cited by Counsel has anything to do whatsoever with what we are talking about here. In the first place, it doesn't appear that the witness who made out the charts was a party to the case; and, in the second place, it shows on the very reading by Counsel that the evidence was almost impossible to produce because of its complexity and so forth, and so that was a substitute

(Testimony of Earl Johnson.)

for the producing of evidence which could otherwise not be produced.

Here, Counsel has got the evidence before him, and he is doing nothing but arguing his case with the witness. Now, I assume, if it isn't overdone, it won't hurt me, and I withdraw my objection on that account; but, if at some time it's abused in my opinion, I would like to be in a position to object.

The Referee: Mr. Walsh?

Mr. Walsh: I have no objection, Your Honor.

The Referee: Well, now, I still have to have the matter clarified, because the Court is a little in doubt on account of sustaining the objection, and then having the objection withdrawn, and then in line with Mr. La Shelle's statement with reference as to whether or not it was going to be construed as evidence or merely as an aid to the Court, and then having Mr. Fisk and Mr. Walsh—[782]

Mr. Fisk: I will have this to offer to the Court: I will either withdraw my objection or leave it there, according to what the Court thinks will less confuse this proceeding from the standpoint of judging the case.

The Referee: Well, then, the Court will consider that all of these pencilled memoranda—I assume there is more than one, Mr. La Shelle?

Mr. La Shelle: Yes, there's one on each warehouse receipt that doesn't have any other attachment in the way of an invoice.

The Referee: Then, the Court will consider all of these memoranda, prepared by Mr. Johnson or

(Testimony of Earl Johnson.)

someone under his supervision or someone else, merely for Identification purposes, and not in Evidence.

Mr. La Shelle: That's perfectly satisfactory.

Mr. Fisk: And the testimony of the witness in this proceeding will be entirely independent of those memoranda.

The Referee: Mr. La Shelle, did you hear Mr. Fisk's statement?

Mr. La Shelle: No, what was that?

Mr. Fisk: I say, and the testimony of the witness will be entirely independent of the written memoranda.

Mr. La Shelle: Well, I don't understand what you mean by that.

The Referee: Well, what Mr. Fisk is saying is, if [783] you have a warehouse receipt, for instance 3383, and it has a pencil or a pen memorandum attached to it, and it says that the warehouse receipt is affected or is a part of supporting document so-and-so and so-and-so, Mr. Fisk wants it definitely understood that that pencil memoranda means nothing with reference to where to look or where to find, as far as evidence is concerned.

Mr. Fisk: Yes, and when the witness gives testimony about that receipt, he is not testifying as to the contents of his memorandum, but as to the documents themselves.

The Referee: Mr. La Shelle?

Mr. La Shelle: That's all right.

The Referee: Very well.

No. 13600

United States
Court of Appeals
for the Ninth Circuit

ANGLO CALIFORNIA NATIONAL BANK OF
SAN FRANCISCO, Appellant,

vs.

SCHENLEY INDUSTRIES, INC., a corporation,
Appellee.

CHARLES W. EBNOTHER, Trustee of the
Estate of Hedgeside Distillery Corporation,
Bankrupt, Appellant,

vs.

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Transcript of Record

In Two Volumes

VOLUME II.

(Pages 481 to 960, inclusive)

Appeals from the United States District Court for the Northern
District of California, Northern Division

FILED
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PAUL P. O'BRIEN
Clerk

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District of California, Northern Division

(Testimony of Earl Johnson.)

Mr. La Shelle: Q. Now, Mr. Johnson, again referring to the attached papers, the 3381-B, and particularly the invoice, the two invoices here, I'll refer you to what appears to be some kind of a stamp or a number, and some red typing down in the lower righthand corner, to the effect that the storage charges accrue from the date of inspection, and so forth, and the same type of stamp and the same red typing,— from your knowledge of the practice of Schenley, is that their entry?

A. That would be Schenley's entry.

Q. For their own internal auditing convenience?

The Referee: Mr. La Shelle——

Mr. Fisk: The photostats before this Court don't [784] show red at all. I don't know what Counsel is talking about.

The Referee: Mr. Fisk, that's the reason I was interrupting Mr. La Shelle. My photostat doesn't, either, so I was going to ask him——

Mr. La Shelle: In other words, that would be for Schenley's own internal auditing convenience.

A. That's correct.

Mr. Fisk: Your Honor, I think that is an objection to that question there. Here is some typing on an invoice in red letters, and the witness was asked, in the light of his knowledge of the practice of Schenley's, is that entry or was that entry put there by Schenley. I submit that this witness can't answer that question. He can state what the practice of Schenley was, but he can't look at a document and say that, in the light of his knowledge

(Testimony of Earl Johnson.)

of Schenley's practice, an entry made on a document was made by Schenley, where it's merely typewritten in.

The Referee: Just a minute, maybe I misunderstood Mr. Johnson. You looked at that invoice.

The Witness: I did.

The Referee: And as I understood, you said that that statement, this stamp and also these red typewritten words there were put on there by Schenley's for their own internal operation and audit, is that correct?

A. Yes.

The Referee: Do you know who put them on there? [785] I am talking about general practice, I mean, referring to that Identification Exhibit.

The Witness: The typewritten statements on there are——

The Referee: Read the typewritten statements.

The Witness: Stating: "Storage charges accrue from date of inspection, stored at Hedgeside Distillery, I.R.B.W. Number 2, Atlas Way, Napa, California." In the operation of Schenley, there is a bulk whisky department, which maintains control or an inventory running record of what is on hand for production purposes. When a contract, or when any agreement is entered into, pertaining to bulk whisky storage, that storage charges will be paid by Schenley, the documents are processed through the bulk whisky department, to determine that material or merchandise is according to their records on hand, and they would make a notation on the

(Testimony of Earl Johnson.)

invoice to the effect that it was okay to pay storage charges, from that particular time, on.

The Referee: Now, getting back to my question:

Q. Do you know anything about those typewritten words in red there?

A. I would say, from my experience with Schenley's, that these had been inserted by our Bulk Whisky Department. They would make the statement to the effect that from that time on, it would be okay for our Accounts Payable Department to pay storage charges.

Q. Do you know whether they did or did not put that statement [786] on that invoice?

A. I don't know whether that particular statement was put on there, but as general practice some notation along that line would be made by that department.

Q. How about that red stamp there?

A. That, I am not sure of, no. It's for internal control purposes. We have various notations made on the invoices, but just what the purpose of that particular one would be, I couldn't answer that.

Q. Do you know who put it on there—that red stamp?

A. No; probably somebody within the——

Q. I don't mean "probably". Do you know, of your own knowledge who put that on there?

A. No.

Mr. La Shelle: The purpose of this is simply, Your Honor—we don't contend that these things

(Testimony of Earl Johnson.)

put on by Schenley have any evidenciary value whatsoever. It is purely for their own internal purpose. And we are not making any point.

We offer a stipulation to Court and Counsel that those notations, as far as evidence are concerned, they have no evidenciary value, but there is no way of taking them off the invoice.

Mr. Fisk: I'll accept your stipulation. I'll stipulate with you that that statement on the invoice should have no evidenciary value in this proceeding.

The Referee: Against the Anglo Bank or against [787] the Trustee.

Mr. La Shelle: Probably they were their entries for their own internal purposes and are self-serving and couldn't prove anything.

The Referee: Mr. Fisk said he would offer the stipulation, and Mr. Walsh said, and you accept the stipulation, Mr. La Shelle?

Mr. La Shelle: Yes.

Q. Now, with reference to the balance of this group here, of warehouse receipts as shown on number 34 for Identification, beginning with 3381 to and including 3407, with reference to the balance of those, have you examined those with reference to the attached documents? You have already done that and assembled them before you came to Court, haven't you? A. I did.

Mr. La Shelle: This group here, Your Honor, which I just mentioned it was with the understanding about the pencilled memoranda attached to the

(Testimony of Earl Johnson.)

warehouse receipts that have no other attached papers, we offer in Evidence as Petitioner's Exhibit next in order, with this exception: The warehouse receipts are not offered at this time, the warehouse receipts themselves. What is offered on the Exhibit is the cancelled check, the voucher, the cancelled draft, the invoice or invoices. I don't think we need to offer the Accounting Distribution. May I just confer a moment? I don't quite understand that. [788]

The Witness: That's strictly an internal memorandum, showing the accounting distribution of payment.

Mr. La Shelle: I think they all have accounting distribution. Let me just check. We only offer the cancelled checks of that group, the voucher, the cancelled drafts and the invoices. The accounting distribution, being an internal audit matter, is not of any evidenciary value. We do not offer it, nor do we offer an office copy of what purports to be a letter dated April 7, addressed to Franciscan by Schenley—I should say, April 7, 1947, which is attached to warehouse receipt number 3407. But we offer the other documents, consisting of cancelled check, voucher, cancelled drafts, and invoice or invoices, as the case may be, as Petitioner's next in order.

Mr. Fisk: Is the letter dated April 7, 1947, from Schenley to Franciscan, attached to warehouse receipt 3407-B, the only letter of that character in

(Testimony of Earl Johnson.)

this group? The photostats furnished us, Mr. La Shelle, don't have any copies.

Mr. La Shelle: Pardon me?

Mr. Fisk: The photostats furnished us don't have any copies of these letters. Now, is this the only letter in that group?

Mr. La Shelle: That's the only one we have.

Mr. Fisk: That's just what I mean. I am not trying to——

The Referee: Mr. Fisk, did you say the photostat [789] furnished you did not have a photostatic copy of the letter of April 7, 1947 attached to warehouse receipt number 3407-B and the accompanying papers?

Mr. Fisk: I said that, and I think I'm correct, but let me check.

Mr. La Shelle: The Court has it. The Court's photostatic copy has it.

Mr. Fisk: No sir, we do not have it. We do not have it, and as a matter of fact, I recall on the morning that Mr. La Shelle handed these documents to me, he had photostats and he had those in the original form, those letters, and I don't think it was ever submitted to us.

Mr. La Shelle: I don't understand it. The Court's copy has it.

The Referee: Mr. La Shelle, we had more than one set of these warehouse receipts and company's documents. Now, do you have your set with you?

Mr. La Shelle: No, I never did have a set, and I might state that I furnished Counsel at consider-

(Testimony of Earl Johnson.)

able expense with my photostatic copy, and I haven't even got a set of these. I have to use the original.

The Referee: You can examine this for a moment.

Mr. Fisk: I have seen the letter, all right, but I don't have a copy of it.

The Referee: But you don't have a copy?

Mr. Fisk: No sir; not any copy of the letters were [790] were furnished to me with any groups.

The Referee: I would suggest, before you make any objection, if you are going to, that you examine the set that has been furnished the Court, warehouse receipts number 3381-B to 3407-B, with accompanying documents, and see what the accompanying documents are.

Mr. Fisk: We have everything but the letter of April 7, 1947.

Mr. La Shelle: Well, it's the last one. It might have gotten torn out.

Mr. Fisk: We didn't get any of it.

Mr. La Shelle: It's the only one here.

Mr. Fisk: I mean, in the other groups there are some more of these letters. I saw a lot of them.

(Discussion off the record.)

The Referee: Mr. La Shelle is offering in Evidence, with the exception of the Warehouse receipts, which he is not offering at this time, the documents that accompany the warehouse receipts that appear on Petitioner's Exhibit 34 for Identification.

Mr. Walsh: Consisting of the documents at-

(Testimony of Earl Johnson.)

tached to 13 warehouse receipts, beginning with 3381-B, down to 3407-B?

The Referee: Correct.

Mr. Walsh: I am going to make the objection, if Your Honor please, the proper foundation has not been laid for the introduction in Evidence of these documents. [791]

Mr. Fisk: That is in line with my previous objection. I object on the ground as to the introduction of each one of the documents as incompetent, irrelevant and immaterial, and no proper foundation laid.

The Referee: Objection overruled, and the Court is now removing the documents just referred to from Petitioner's Exhibit Number 30.

Mr. Fisk: The documents will be kept— The other remaining documents will be kept with the Court for Identification.

The Referee: That's right. What I am trying to do, Mr. Fisk, is——

Mr. Walsh: You better remove the warehouse receipts.

Mr. Fisk: I think that would probably be the best way to do it.

The Referee: I am trying to do it the simple way, but still have all the documents before the Court. All of them are still here for Identification, but what Mr. La Shelle has done, he has taken a portion of Petitioner's Exhibit Number 30 for Identification, and offered those documents in Evidence.

Mr. Fisk: Wouldn't it be simpler to write on the

(Testimony of Earl Johnson.)

back of the ones that are not offered or received at this time—"Not received in Evidence"?

The Referee: I won't even touch the group that are still marked Petitioner's Exhibit 30 for Identification. [792] We will still have that Exhibit. What I am doing, I am overruling your objection and Mr. Walsh's objection, and I am receiving in Evidence, not the warehouse receipts, but the supporting documents accompanying those thirteen warehouse receipts.

Mr. Fisk: Exclusive.

The Referee: Exclusive of the warehouse receipts, and calling that Petitioner's Exhibit Number 49 in Evidence.

Mr. Fisk: But Your Honor, he excluded other documents, too.

The Referee: And also, pursuant to the stipulation, the other documents, including the notations that we have already referred to——

Mr. Fisk: No, I didn't have reference to that. He excluded other documents.

Mr. La Shelle: I excluded the internal audit paper and that letter which still remains marked for Identification. I'm sorry that this evidence is of such a nature, Judge; I just can't put it in much easier.

The Referee: That part is all right, except that Counsel on all three sides are entitled to know what is in and what is out.

(Discussion off the record.)

Mr. La Shelle: I do this, without prejudice, to

(Testimony of Earl Johnson.)

anyone's rights. It's simply a distinction to see if we can keep our Exhibits a little easier. Number 30 for Identification, [793] which includes this group on the schedule here for Identification Number 34, starts with 3381-B, which is, we will contend later, under this Franciscan contract, first.

The Referee: Now, wait a moment. 3381-B to 3407-B.

Mr. La Shelle: 3381-B to 3407-B. That's the group you have, and the next group are these warehouse receipt numbers, and purely for identification purposes at this time start with 3511-B and run to 3673-B. While that is Franciscan production, it was not bought from Franciscan. It was bought, we contended, from Hedgeside.

The next group, beginning with 3673-B, over to and including 3687-B, which comprise the entire Exhibit 30, was bought under Petitioner's Exhibit 25-B, the October 13, 1947, contract.

And I think perhaps it would be better if I went over those quickly and introduced the whole bunch as a group. Then, all we have to do is to write in each, instead of having the Exhibit Number. I'll proceed along those lines, subject to all of the rights of the opposition to object. I make that as a suggestion for clarity.

Mr. Fisk: That's all right with me.

The Referee: I have no objection.

Mr. Walsh: I have no objection.

The Referee: We haven't clarified this matter yet. First of all, the Court has indicated here Pe-

(Testimony of Earl Johnson.)

titioner's Exhibit Number 49. There is no 49 at the moment, the last Exhibit [794] being 48, Certified Copy of the Articles of Incorporation, so I will strike this 49, but I am still receiving in Evidence, subject to Mr. Fisk's request for a clarification, as to just what is going in Evidence on this original offer you have made. Now——

Mr. La Shelle: Now, I'll proceed.

The Referee: Mr. La Shelle, now wait a minute. Still talking about this group from 3381 to 3407-B, there are certain documents in this group that, by your own statement, are not in Evidence.

Mr. La Shelle: That's right.

The Referee: First of all, there are those pencil memoranda for the aid of Court and Counsel throughout.

Mr. La Shelle: Considered to be for Identification only.

The Referee: Right. The warehouse receipts are not received at this time.

Mr. La Shelle: Identification only.

The Referee: The red lettering, typewritten statements and the stamp on the invoice is not a part of the evidence.

Mr. La Shelle: That's correct, that's not Evidence, merely Identification.

Mr. Fisk: Not the stamp on the invoice. Mine is the red lettering. I don't know what the stamp on the invoice is. [795]

The Referee: The red lettering that was read into the record that you stated was for internal pur-

(Testimony of Earl Johnson.)

poses only, Mr. Johnson stated that; is that right?

The Witness: Yes.

The Referee: And there was also a stamp, in addition to the typewritten words; is that true?

The Witness: That's right.

The Referee: And those red letter statements and the red letter stamp on those documents, whatever it might be, whatever kind of documents are, put on there by Schenley's for their internal purposes only.

The Witness: I believe that's true; I'm not positive.

Mr. Fisk: As far as the stamp is concerned, it's the stamp of a bank.

The Witness: It may be. That's why I say I believe that's true, but I am not certain about that.

Mr. La Shelle: In any event, we are not offering—I mean, we can't take it off, the way we can take something off that is attached.

Mr. Fisk: That's right, but we have a stipulation that the typewritten statement of storage charges accrued from date of inspection and stored, and so forth, were not evidenciary in this case. Now, that doesn't go to the other stamp.

Mr. La Shelle: Well, if you want to use it, it's all right with me. [796]

The Referee: Well, for the purpose of clarity, then, the stipulation is that the typewritten words on there are not received in Evidence and do not alter the document upon which they appear, but were merely for the use of Schenley.

(Testimony of Earl Johnson.)

The Witness: That's right.

The Referee: As far as the stamp is concerned, it is still a part of the document, and you don't know who put that in there.

The Witness: I don't know who put that in.

The Referee: Does that satisfy you, Mr. Fisk?

Mr. Walsh: You forgot to put "typewritten in red".

Mr. Fisk: You left out the "red".

The Referee: Oh, typewritten in red.

Mr. Fisk: My stipulation that it was not put on there by Schenley, it was simply that it was not offered in Evidence, or to be used under this offer as Evidence in this proceeding. I don't know who put it on there, or anything about that.

Mr. La Shelle: That's my understanding, that the little typewritten notation, with reference to storage charges and storage, is of no evidenciary value in this case.

The Referee: And is not a part of the document.

Mr. La Shelle: Yes, in other words, we would take it off, if we could.

The Referee: Now, the next stipulation was that on some of these warehouse receipts there is also another document, "Accounting Distribution".

The Witness: Pardon me, Your Honor, there is a form which all of these carry, form T.C. 10.

The Referee: Form T.C. 10, Accounting Distribution, which was merely for internal purposes only of Schenley's.

The Witness: That is correct.

(Testimony of Earl Johnson.)

The Referee: And, Mr. La Shelle, that is not a part of this Exhibit. The internal distribution T.C. 10 form, is that right?

Mr. La Shelle: That's correct.

The Referee: Now, that will clarify temporarily that portion of Exhibit Number 30. The Court will receive the documents, as specified in Evidence, will overrule the objection, but prior to marking them will go along with Mr. La Shelle's suggestion that we proceed with the balance of Petitioner's Exhibit Number 30 for Identification.

Mr. La Shelle: I'll show you, and referring particularly to Petitioner's Exhibit Number 34 for Identification, which purports to be various warehouse receipts, beginning on 34 for Identification, with the number 3511-B, down to and including 3687-B—

Mr. Walsh: Consisting of how many, Mr. La Shelle? 33?

The Witness: No, there are some duplicate numbers there, Frank.

Mr. La Shelle: Lots of duplicate numbers.

The Witness: Thirteen. [798]

Mr. La Shelle: A lot of numbers are written twice where there are duplicate invoices.

Mr. Walsh: Thirteen of them.

The Witness: That's right.

The Referee: How many?

Mr. Walsh: There are thirteen of them.

Mr. La Shelle: Q. Now, with reference to that group that I just enumerated, Mr. Johnson, did

(Testimony of Earl Johnson.)

you assemble the various papers that are attached to those warehouse receipts? A. I did.

Q. And where did you get those attached documents?

Mr. Walsh: Now, Mr. La Shelle, so we won't be mixed up, you are offering 3511-B down to 3687-B?

Mr. La Shelle: That's right.

Mr. Walsh: Which also includes the warehouse receipts covering the Hedgeside liquor.

Mr. La Shelle: Yes. In other words, without binding you at all by my statement, at the conclusion of this case, we will contend that that merchandise, represented on the first page under the caption, "Spirits and whisky purchased from Hedgeside", et cetera, beginning with warehouse 3511-B, down to and including 3673-B, were purchased from Hedgeside, and not from Franciscan.

Mr. Walsh: Under what contract?

Mr. La Shelle: Under Part 2 of the 10-13-47 contract between Schenley and Hedgeside, in which certain on-hand [799] spirits were purchased. They were described as "on-hand spirits", as distinguished from spirits to be produced. If you want to see it, I'll show the part——

(Discussion off the record.)

Mr. La Shelle: Under part 2 of 22-B, Schenley agreed to purchase certain on-hand spirits, which are represented in Exhibit A to the contract.

Mr. Walsh: And belonging to Hedgeside, not Franciscan.

(Testimony of Earl Johnson.)

Mr. La Shelle: That's correct.

Mr. Walsh: What is the purpose of introducing all these documents in Evidence, consolidating the Hedgeside with the Franciscan?

Mr. La Shelle: Well, the only thing was that originally, simply for purposes of identification, we put these in two groups, because that whisky under part 2 there had originally been produced by Franciscan, sold to Hedgeside, and they sold to us.

Mr. Walsh: We can take that up at the next hearing.

Mr. Fisk: I have made an appointment at 4:00.

Mr. La Shelle: I'm sorry.

(Thereupon an adjournment was taken.)

* * * * * [800]

EARL JOHNSON

having been previously sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Mr. La Shelle: I'll hand you the originals, what purport to be original [803] warehouse receipts 3511-B, 3512-B, 3671-B, and 3673-B, with reference to that group of warehouse receipts, did you assemble those? A. I did.

Q. And the attached papers in the way of cancelled checks, vouchers and invoice came from where?

A. From the files of Schenley. They might have come from either New York or from the San Francisco files.

(Testimony of Earl Johnson.)

Mr. Walsh: Just a minute, your Honor please, I am going to ask that that answer go out—they might have come.

By the Referee: Q. Do you know, Mr. Johnson?

A. I could tell by inspection of each document. I say they're the same form of document. I would have to go by the dates and by the request which I made of New York to know whether they came from New York.

Q. Can you tell by examining those documents now and tell the Court or counsel whether they came from—each individual came from New York or San Francisco or by examining accompanying documents?

A. I believe I can. Attached to 3511-B, the check—the cancelled check came from the New York Internal Audit Department.

By Mr. La Shelle: Q. Where did the balance of the attached papers come from?

(Discussion off the record.) [804]

The Referee: And the witness has testified that the check in the sum of \$1701.38 came from the New York office.

A. The copy of the voucher, copy of the Hedge-side invoice attached to that warehouse receipt, came from the New York Accounts Payable Department.

Q. How about the rest of them?

A. In connection with all of the documents, except for the cancelled checks, they all came from

(Testimony of Earl Johnson.)

the New York Accounts Payable Department. I would have to refer—I can't tell exactly on the checks; I would have to go by the cancellation dates whether they came from the New York Internal Audit Department or from my department out here—corresponding department out here. That I would have to refer in these particular instances to the correspondence.

Q. Well, in either event, they came either from the New York Accounts Payable Department or San Francisco.

A. No, in the cancelled checks, it came from the Schenley Internal Audit Department, either from the New York or from the San Francisco files of that department.

By the Referee: Q. But on this group, the other accompanying documents came from the New York Accounts Payable Department.

A. That's right.

Mr. La Shelle: All right, this group, your Honor, consists of the second part of the schedule here and with [805] the exception of the warehouse receipts, which are not yet properly qualified, we offer those attached papers to those warehouse receipts in evidence, subject to the understanding that the little pieces of paper that we have heretofore discussed that act as an index guide, be considered only for identification and on one or two of these there is also a letter from Hedgeside which we will leave clipped because that's where it belongs, but that is not yet offered in evidence because that has not yet

(Testimony of Earl Johnson.)

been qualified. We'll have to do that by another witness. That would be Petitioner's Exhibit No. 50.

The Referee: With the exception of the warehouse receipts and the memorandum and the original letters attached, Petitioner's Exhibit No. 50.

Mr. Walsh: Now, that's subject to the objection that has already been heretofore made, your Honor please.

The Referee: It is understood.

Mr. Fisk: With respect to the first group shown in Petitioner's 34-c for Identification.

The Witness: That's 49.

The Referee: No, with reference to the second group included in Petitioner's schedule No. 34 for Identification, commencing with warehouse receipt No. 3511-B down to and including warehouse receipt number [806] 3673-B, the accompanying papers, exclusive of the warehouse receipts and the documents mentioned by the Court, the objection is overruled, Petitioner's Exhibit No. 50 in evidence. Was formerly a part of No. 30 for Identification.

Mr. La Shelle: Now, the next group that we are going to work on, your Honor, is the third group on Schedule C, Petitioner's No. 34 for Identification, under the caption on the schedule "Spirits produced under the terms of the contract dated October 13, 1947" and you will note from the schedule there, that the first warehouse receipt number is 3673-B, which is also the last one of the other group. It just so happened that the way that these things came through ultimately, (I explained that before)

(Testimony of Earl Johnson.)

so naturally we can't have them in both groups.

Q. Handing you this group of exhibits, beginning with warehouse receipt No. 3674-B as shown by the schedule on Petitioner's Exhibit No. 34, down to and including No. 3687-B, did you assemble the documents attached to those warehouse receipts and the warehouse receipts? A. I did.

Q. And the warehouse receipts in this group and also the last group were obtained where—the warehouse receipts themselves?

A. The warehouse receipts themselves were obtained from the heads of our production department, San Francisco. [807]

Q. And then with reference to the attached documents, which consist in the main of cancelled checks, invoices and vouchers, were they the same as the last group, either from the San Francisco or New York office of Schenley's? A. Yes.

Mr. La Shelle: And your Honor will note—

The Referee: One to how far? Down to 87?

The Witness: I think that's it.

Mr. La Shelle: Your Honor will note on many of these there is attached the original letters from Hedgeside to Schenley enclosing the new Hedgeside receipt that originally had been covered by receipts of Franciscan, or rather, I think they called it Mountain View, and then those were surrendered and changed. Many of these have these letters attached and, of course—I am not offering those in evidence. We offer this group as petitioner's exhibit next in number, 51, I guess, with the same under-

(Testimony of Earl Johnson.)

standing, that whatever notes there are in the way of an index or a guide be considered simply for identification and the letters that are clipped to it from Hedgeside enclosing the warehouse receipts and the warehouse receipts themselves are not yet to be considered in evidence, although they are clipped together in a group which we're keeping it just for mechanical purposes of keeping them in order.

The Referee: Objection overruled, Petitioner's Exhibit [808] No. 51, formerly a portion of Petitioner's Exhibit No. 30 for Identification.

Mr. La Shelle: In other words, originally, your Honor, 30 consisted of production of four serial numbers or less, which is Franciscan; 31 consisted of five serial numbers or more, which was Hedgeside and while the serial numbers in this group are Franciscan production, they were on-hand spirits both under the October 13, '47 contract from Hedgeside and no contention is made by the petitioner in this case that this was a transaction between petitioner and Franciscan. It is our contention that it was a transaction between petitioner and Hedgeside under the second part of the October 13, 1947 contract, which is Petitioner's Exhibit 22-B.

The Referee: Mr. La Shelle, let me have the original groups of 49, 50 and 51 because you're withdrawing them now and substituting photostats.

Mr. La Shelle: Oh, yes.

(Discussion off the record.)

Mr. Fisk: Mr. La Shelle, before you proceed, so that—it may be stating in different language the

(Testimony of Earl Johnson.)

same thing you have said, but so that I will have it clearly in my mind as to what you have introduced in evidence of these groups, there is a warehouse receipt which is not in evidence, there is a cancelled check, [809] there is a voucher, there is an invoice and there is a——

Mr. La Shelle: Let me put it this way: In some instances there is nothing attached except Mr. Johnson's little index guide because in some instances the invoice will support two warehouse receipts and not just one. But put it this way: That in that group there, generally speaking, it consists of cancelled checks, invoices, vouchers, and——

The Referee: Sight draft?

Mr. La Shelle: Mr. Johnson's little index. In that group there are no sight drafts. Are there? No.

The Witness: No.

Mr. La Shelle: In some of the other groups, there are.

The Referee: But Mr. Johnson's index is not in and the letters that are attached to some are not in, and the warehouse receipts are not in, is that correct?

Mr. La Shelle: That's correct. For example, here is one in the group coming up where the only thing attached to it is a little index.

Q. Now, Mr. Johnson, for the benefit of Court and counsel, the next group starts on page 3, I guess it is, of Petitioner's Exhibit No. 34, starting with warehouse receipt No. 3364-B, which is the first warehouse receipt on the schedule under the

(Testimony of Earl Johnson.)

September 17, 1945 contract as amended and extends down to and [810] including warehouse receipt No. 3435-B. That's this group here (indicating). I'll hand you that group of warehouse receipts beginning with 3364-B. Would you just look those over for a minute and familiarize yourself with them? Now, that group of warehouse receipts that I just mentioned, you assembled that, did you?

A. Yes, sir.

Q. And the warehouse receipts themselves came from where?

A. From the production offices in our San Francisco location.

Q. And the attached documents to the respective warehouse receipts in question came from where?

A. They came from two sources in our New York office. The cancelled checks in all cases came from the Internal Audit Department, our New York office. The other supporting documents came from our Accounts Payable Department in the New York office on this particular group.

Q. Now, in this group, your Honor, for Mr. Fisk's benefit, I think each one of these involve a sight draft do they not? A. I believe so.

Q. Yes. Each have sight drafts, with the exception, of course, the warehouse receipts that have nothing except the index attached to them. With the exception of—oh, I might add this. I notice that warehouse receipt No. 3364-B has on the back what purports to be a withdrawal of 45 barrels and I believe some of the others have various withdrawals

(Testimony of Earl Johnson.)

on them in all of these exhibits and am I correct in stating that the [811] schedule, Petitioner's Exhibit No. 34 makes allowances for those withdrawals?

A. Yes.

Q. In other words—

A. It shows the net quantity on the warehouse receipts now.

Mr. La Shelle: On this group, with the exception of warehouse receipt, and with the exception of the various office copies of letters purporting to be written to Schenley and Hedgeside, for the record attached to warehouse receipt No. 3364-B in what purports to be an office copy of Schenley's New York office, dated March 3, 1947 addressed to Hedgeside, those letters are not offered. They can be considered for identification in the same manner that the index guide is considered for identification. With those exceptions, we offer the attached documents in evidence in this group as Petitioner's Exhibit No. 52, is it?

The Referee: Objection overruled, Petitioner's Exhibit No. 52 being the accompanying documents from warehouse receipt 3364-B up to and including warehouse receipt No. 3435-B, with the exclusion of the documents mentioned by Mr. La Shelle.

Mr. Fisk: One question. I don't quite understand counsel's statement with reference to the letter attached to warehouse receipt 3364-B and similar letters attached to the other warehouse receipts, which letter is dated March 3, 1947 and purports to be a letter from Schenley [812] to Hedgeside.

(Testimony of Earl Johnson.)

That letter is to be a guide. What do you mean by a guide?

Mr. La Shelle: No, no, I am just offering it. No.

Mr. Fisk: It's just in for identification.

Mr. La Shelle: It's just in for identification. It was sent to us and here it is.

The Referee: And the documents just referred to were formerly a part of Petitioner's Exhibit No. 31 for Identification now become Petitioner's Exhibit No. 52 in evidence.

Mr. La Shelle: And also further to identify that, that's the group of warehouse receipts on Petitioner's Exhibit No. 34 for Identification on page 3 of the exhibit purportedly under the terms of the contract, from Hedgeside, dated September 17, 1945. If you take that schedule and put brackets around these various warehouse receipts there in the exhibit number, it might be some help to following the evidence.

The next group is on the same page of Petitioner's Exhibit No. 34 for Identification, which will be the last group: "Spirits produced and purchased under the terms of the contract dated October 13, 1947." It begins with warehouse receipt No. 3480-B down to and including 3670-B, with the exception of warehouse receipts Nos. 3525, 3538, 3539, 3541, 3543, 3546, and 3545 which are [813] already a separate group numbered 43 and according to my list, they are for identification. The reason that I took those out, your Honor may recall those consist of the serial number range which the bank claims in

(Testimony of Earl Johnson.)

its pleadings to have duplicate warehouse receipts and for that reason so that they can easily be identified for reference purposes we made them another exhibit number.

Q. Now, take this range of certificates, or warehouse receipts, I should say, 3480 to 3670 which I just discussed, would you look those over please for a moment? A. I inspected them.

Q. You assembled this group of warehouse receipts also? A. I did.

Q. And the warehouse receipts came from where?

A. From the production management in our San Francisco offices.

Q. And the attached papers were assembled by you and where did they come from?

A. The checks, the cancelled checks came either from the New York Internal Audit Department or the files of my department, which is the Internal Audit Department on the West Coast. The other supporting documents were obtained from the New York Accounts Payable Department.

Q. And this group does not have any sight draft, does it?

A. There's a few—the first few have. I think it's only [814] the first one, attached to 3480-B.

Q. I am not sure, I think this was covered, but at the risk of asking you again, with reference to the sight drafts as shown by various other exhibits, in some groups and in some instances there are sight drafts as attached papers and in other groups there are not any such attachments. I think that the

(Testimony of Earl Johnson.)

ones that have sight drafts are the ones where the sight draft was on New York, wasn't it, through the Bankers' Trust? A. That's true.

Q. And with reference to the sight drafts that were used locally here in San Francisco, you made a search for those?

A. I made a search for them.

Q. You have been unable to find them?

A. I have been unable to find them.

Mr. La Shelle: On this group, your Honor, we offer these attached papers, not the warehouse receipts, but the attached papers, in evidence with a similar offer before. For example, there are attached occasionally some letters similar to the letters I mentioned before and in one particular instance, there is attached to warehouse receipt 3480 a telegram dated October 29, 1947 from J. B. Donnelly to J. B. Popkin. That telegram, of course, is not offered. It happens to just be clipped in. As a matter of fact, there are two or three things, such as what appears to be a teletype message, two or three telegrams, are [815] attached to this, as well as a news communication. The telegrams, interoffice communications, letters and the like can be considered merely as identification and not in evidence.

Mr. Walsh: May I see that before it is put in evidence, please?

Mr. La Shelle: I might say, off the record. I'm sorry to take so long.

The Referee: That's all right.

(Discussion off the record.)

(Testimony of Earl Johnson.)

Mr. La Shelle: Then many of these warehouse receipts also have the only supporting or attached document is the index guide of Mr. Johnson which is also understood as being just for identification as an index or partial guide. We will offer this group, your Honor—well, the group that I read off a moment ago, in evidence under those conditions.

The Referee: Objection overruled, documents referred to by counsel formerly a part of Petitioner's Exhibit No. 31 for Identification become Petitioner's No. 53 in evidence.

Mr. Walsh: I assume that you are withdrawing the originals and substituting photostatic copies.

The Referee: Yes.

Mr. Fisk: I also assume that all these original documents that you are withdrawing, you will keep them [816] in San Francisco until we have at least concluded the putting in of evidence.

The Referee: That's understood.

Mr. La Shelle: Oh, yes. We have got the originals of everything so far.

(Discussion off the record.)

Mr. La Shelle: Now, I am referring to another group of exhibits which were excluded from the last number—what was it, 52?

The Referee: 53.

Mr. La Shelle: Fifty-three, and these warehouse receipts, Nos. 3525-B, 3538-B, 3539-B, 3541-B, 3543-B, 3544-B, and 3545-B, that group again, for the purpose of identification, representing serial numbers of Hedgeside production which the bank

(Testimony of Earl Johnson.)

claims in its answer to have duplicate warehouse receipts for.

The Referee: And formerly No. 43 for Identification.

Mr. La Shelle: And formerly No. 43 for Identification.

Mr. Fisk: The bank claims warehouse receipts, not duplicates.

Mr. La Shelle: Well, a rose by any other name.

(Laughter.)

Mr. La Shelle: With reference to this group of warehouse receipts, I think you have previously testified [817] but I am not sure, that you assembled that group? A. I did.

Q. And the warehouse receipts themselves came from the San Francisco production department?

A. The originals in the warehouse receipts represented. These are the photostats. The originals came from the San Francisco production offices.

Q. And then the attached papers came from where?

A. The checks, the cancelled checks came from either the New York or the San Francisco Internal Audit Department files. The remaining documents came from the New York office, accounts payable files.

Q. With reference to this group, your Honor, with the same understanding as the warehouse receipts themselves, we offer this group of attached documents to these warehouse receipts, in evidence. I don't think there are any of these indices at-

(Testimony of Earl Johnson.)

tached to these. If there are any, the same understanding. That will just cover 43 in evidence, I think.

(Discussion off the record.)

Mr. Fisk: As I understand the Court, all of these documents now which counsel has termed "supporting documents" are offered subject to our objection that they are irrelevant, incompetent and immaterial and no proper foundation laid, with the result that if they are not connected up they would go out anyway because counsel contends these are supporting documents for the [818] warehouse receipts.

The Referee: Correct.

Mr. Walsh: What was your answer, your Honor?

The Referee: That's correct. Mr. Fisk's statement is correct. Well, when you say "supporting documents," you are excluding those other documents that Mr. La Shelle has excluded.

Mr. Walsh: Well, he has. I'm not excluding them.

The Referee: Yes, he has excluded other documents.

Mr. Walsh: That's right.

The Referee: Besides all the ones attached to the warehouse receipt.

Mr. La Shelle: I might state, you gentlemen have checked those very carefully already.

Mr. Walsh: We're very careful. We would like to refresh our memory.

Mr. Fisk: What is that on the back of those?

(Testimony of Earl Johnson.)

The Referee: 43 for Identification. Now, in addition to the objection, did you say that you might have a further objection to make?

Mr. Fisk: No, not at this time.

The Referee: Mr. Walsh?

Mr. Walsh: Other than the general objection we raised before.

The Referee: Objection overruled, Petitioner's No. 43 for Identification becomes Petitioner's No. 43 [819] in evidence.

Mr. Walsh: You're going to put that in as 43?

The Referee: Same number—43. The reason I changed those other numbers was because they were only a part of the former exhibit.

Mr. La Shelle: Directing the attention of court and counsel to Petitioner's Exhibit in Evidence No. 22-B which is the contract of October 13, 1947 between Schenley and Hedgeside and directing the witness' attention to page 17 of that contract, paragraph captioned "prices," now with reference to this contract Mr. Johnson, did you personally supervise the determination of the prices under that contract? A. Yes.

Q. And I might state, your Honor, without reading the whole thing, simply to clarify this, that the contract provided for partial payment when the invoices came through according to a price formula and thereafter an order on the price formula which in substance amounted to more or less of a cost-plus formula based on the cost of grain and then on beverage purposes I think it was 12½ cents plus

(Testimony of Earl Johnson.)

and on redistillation stuff it was 5½ cents, is that right? A. That's right.

Q. And——

Mr. Fisk: Now, wait, just a minute. Counsel started out by way—— [820]

The Referee: He was going to make a statement.

Mr. Fisk: He was analyzing the contract and then he finishes up and asks the witness: "Is that right"? I submit the contract speaks for itself. I don't object to your making your statement.

Mr. La Shelle: We can strike that out. I am just trying to save a little time so that the Court and everybody doesn't have to read through the whole contract.

Mr. Fisk: The witness' answer goes out.

The Referee: The witness' answer goes out.

Mr. La Shelle: As far as that's concerned, the contract speaks for itself and anything that I say that is contrary to the contract will, of course, be disregarded.

Q. Now, what did you do with reference to audit, monthly or otherwise, with reference to a final payment of a price under this contract?

A. Well, under the terms of the contract, monthly audits were provided to determine what the actual cost of production was at Hedgeside. During the month's operations, we accepted spirits and paid for them on a basis of a pricing formula which is contained in the contract. At the conclusion of each month's or approximate month's transactions, it

(Testimony of Earl Johnson.)

might have extended over, I believe—at the final audit it extended over to a period slightly longer than a month, and in the first [821] audit, due to a short period of production, from the time of the inception of the contract until the end of October, 1947 I believe that the audit was made covering the latter part of October and the beginning or all of November's production. Generally, it covered a month's production. My men—I established a procedure of audit which took as a basis, the payments which were made for the spirits accepted during the month of production and through establishing a cost control over what had actually been paid for what went into the manufacture of the spirits, plus the allowances for the plus portion of the contract which were for redistillation purposes, or for beverage purposes. We determined what the actual cost of production had been. Then, by subtracting the amount which had been paid against the amount which should have been paid, we determined whether there was a net payment to be made to Hedgeside in the event of this contract or whether Hedgeside if that particular period's production had been overpaid, so that there would be an amount refundable to Schenley.

Q. Now, what this has reference to, your Honor, is Petitioner's Exhibit No. 35 for Identification, which is called also Schedule D. And directing your attention to Petitioner's Exhibit No. 25-b, I believe it is, in evidence, which is the October 13 contract

(Testimony of Earl Johnson.)

between Schenley and Franciscan, did you make similar audits on that contract?

A. I think the audit was made on the same basis according to the terms of the contract which were in essence similar [822] to the terms in the Hedge-side contract.

Q. Now, I'll show you various—I'll show you a group of exhibits consisting of such groups, the top exhibit on each group being a Schenley check, the first one is 3068, 4683, 5707, 7401, 8734, 10272, 11420, and in each group there is a voucher and attached to that is a mimeographed form of audit consisting of a number of pages. Did you assemble this data, Mr. Johnson?

A. Yes, I did.

Q. And the cancelled checks came from where?

A. Either the files of the New York Internal Audit Department or the files of the Internal Audit Department, San Francisco.

Q. And the rest of the attached documents which you will be good enough to enumerate, came from where?

A. They came from the Accounts Payable files in the San Francisco offices.

Q. Now, simply for the purpose of clarity, I would like to have this for identification next in order, your Honor.

The Referee: 54.

Mr. La Shelle: I believe on that day, we went over all of these things, early in January——

(Discussion off the record.)

Mr. La Shelle: I don't think we can go any

(Testimony of Earl Johnson.)

further now because counsel want to look at this so we can recess at this time. [823]

Afternoon Session—2:00 o'clock p.m.

Mr. La Shelle: Your Honor, we were going into Schedule D and we're taking the group of photostats that counsel has checked against the original. I am dividing them into two groups, one for Hedgeside and one for Franciscan and if you would be good enough to mark this group, the Hedgeside group, as petitioner's exhibit for identification next in order?

Mr. Walsh: 54.

(Discussion off the record.)

The Referee: 54 will be the group starting with 07108 and ending with check No. 14599.

Mr. La Shelle: The next group beginning with check No. 08494 and ending with 13519, Franciscan group, be Petitioner's Exhibit No. 55 for Identification.

(Discussion off the record.)

Q. Now, Mr. Johnson, referring to Exhibit No. 54 for Identification, which consists of groups of documents, the first document of which is a cancelled check, (check numbers are not in sequence) 07108, 08549, 09514, 10930, 12171, 13520, and 145699, now, taking the first group of documents which are clipped together on check No. 107108, there is a voucher immediately under the——

The Referee: What was that number again, Mr. La Shelle? [824]

(Testimony of Earl Johnson.)

Mr. La Shelle: 107108.

The Witness: 07108.

Mr. La Shelle: My mistake, 07108.

Q. (Continuing): Underneath that is a voucher, underneath that is a request to check, purporting to be signed by yourself, then underneath that is an internal order, interoffice communication dated December 10, 1947 from E. I. Johnson to W. H. Evers and then underneath that, Exhibit A, and then following that is Schedule 1, Schedule 1-a, and Schedule 1-b. Now, referring to Exhibit A and the schedules 1, 1-a, and 1-b which are mimeographed, when were they made up?

A. They were made up just before the day of the covering letter on December 10, 1947.

Q. In other words, they were made up at or about the time of the audit. A. That's right.

Q. They weren't made up just for this litigation. A. No.

Q. Now, this refers, of course, to the Hedgeside contract of October 13, 1947. Now, as I understand it, you read the Exhibit A and the schedules in support of it, you start with the bottom schedule and read up, that is, you start with schedule 1-b.

A. That is correct.

Q. Now, were these schedules and exhibits that I have just referred to, made up under your personal supervision? A. Yes. [825]

Q. And with reference to the method of setting up the audit, did you set that up yourself personally or did someone else do it?

(Testimony of Earl Johnson.)

A. I did that personally.

Q. And referring to Schedule 1-b, the bottom schedule, I notice that there are various columns here and various figures, and will you please tell the Court where the data was secured for these various columns and what they mean and how they were set up?

A. Well, the information was pertaining to Schedule 1-b was obtained from the records maintained on the premises of Hedgeside Distillery in Napa. The first column refers to Form 1520 which is the government record form covering the production during that period, the number of barrels, the serial numbers and so forth, I believe, are all shown on that form, the number of OPG's—

Q. What are the OPG's?

A. That's the original proof gallons of production on the respective dates under this contract as shown on the form. The dates are shown under the first column following premises on 1520, which is a government form.

Q. Then as I understand it, Schedule 1-b fulfills the function of showing the total production in question that was audited?

A. That's right.

Q. And then is Schedule 1-b carried over into the next schedule?

A. That's correct. The summarization of 1-b is shown on [826] Schedule 1-a.

Q. And whereabouts is that shown?

A. No, I believe I'm wrong there. Schedule 1-a is another supporting schedule. Schedule 1-a and

(Testimony of Earl Johnson.)

Schedule 1-b actually support the information which is summarized on Schedule 1.

Mr. Walsh: Just a minute, I am going to ask that answer go out.

The Referee: So ordered—not responsive.

Q. Well, the total production shown on Schedule 1-b which appears to be 37,192.13 proof gallons, on what schedule is that carried over to?

A. That's carried over to Schedule 1.

Q. That's carried over to Schedule 1. So it does not appear in Schedule 1-a. A. No.

Q. Then Schedule 1-a, taking the various columns involved here, you have invoice, date delivered, date of grain, vendor, lading per cwt, amount malt and so forth, will you explain to the Court under the circumstances of audit used, from what source this information was secured?

A. Well, the source of purchases——

Q. Taking count by count.

A. Well, the source of purchases, which is essentially what is covered here, would be obtained from copies of information from the companies shown under the column entitled "vendor."

The Referee: What company? [827]

A. (Continuing): Well, there's various companies which the grains which were used in production were purchased from. That's all shown in this column entitled "vendor" on Schedule No. 1-a. The first—the invoice date was obtained from the vendor's invoices, the delivery date of grain was obtained from the vendor's invoices or the support-

(Testimony of Earl Johnson.)

ing documents to those invoices which would have been bills of lading or delivery receipts.

Q. Now, on the thing where it says "vendor" and it starts out Rohr Malting Company, I don't think that's quite clear what is meant there by the word "vendor." Who is vendor?

A. That would be the vendor, who from the Hedgeside Distillery Corporation purchased the items covered on these invoices.

Q. In other words, that's Hedgeside's vendor and not Schenley's. A. That's right.

Q. Now, on the next column where you have the top caption "milo," is it m-i-l-i? A. Milo.

Q. Then you purchase rate per cwt and amount. What does cwt mean?

A. Well, the cwt is a hundred weight.

Q. And will you explain to the Court what that is and what source that data was secured from?

A. Well, the first two columns under milo, the pound and the amount were obtained from copies of these invoices from the vendor shown in the third column over. In order to apply those [828] items in accordance with the terms of the Schenley-Hedgeside contract, it's stipulated in the contract that an average cost per pound, a weighed average cost per pound would be used. Therefore, in order to obtain the figure used, under the second column under milo, which is weight per hundred weight, we summarized the purchases by pounds and summarized the amounts and divided the total number of pounds into the amount in order to obtain the average and

(Testimony of Earl Johnson.)

that average shows then down against the column or against the line showing total available average cost. The same thing would apply under malt—what the average cost per hundred weight would be for the malt which was purchased from these sources.

The Referee: Just a minute now. So I won't be too confused, I see all the vendors listed in Schedule 1-a, I see the pounds and I see the amount, but under milo, the matter that you have just been testifying to, my exhibit is blank as far as rate per hundred weight is concerned on Schedule 1-a.

A. (Continuing): Your Honor, in order to obtain the average cost per hundred weight, which is determined per the contract, in order to determine that average cost, we had to take whatever the inventory was at the beginning—what was on hand at the beginning of the operating period, plus all of the purchases during that period, less the ending inventory of that period and in order to determine what the average cost would be, you would have to divide the total number of pounds available into the [829] total money which was paid for those available pounds and that figure appears underneath the line in the center column, rate per hundred weight.

Q. What figure is that so I can follow?

A. 4.43083.

Q. Now, on the lower lefthand side—

Mr. Fisk: Before you pass that, if the Court is through, I would like to just ask him a question by way of explanation. You said that the 4.43 odd cents

(Testimony of Earl Johnson.)

is the average cost of milo per hundred weight.

The Witness: That's right.

Mr. Fisk: Q. As determined from adding the column on the left and the column on the right and dividing the right into the left.

A. That's correct.

Q. The average for what period?

A. Well, this here covered the production period for the month of October.

Q. No, but we are not talking about production now; you are talking about purchases of grain. Now, you are getting the average cost of purchases over what period? For October production, Hedgeside wouldn't have to purchase all of its grain in October, would it? A. No.

Q. Well, then, what period are you talking about the average for?

A. It would be the period of production—they broke off [830] producing for audit purposes at the close of each month and at the end of that month, you would have certain available grain which would start your inventories at the beginning of the subsequent month. In addition to that, you would have certain items which were in the process and that would all be tied down to the government records which I have referred to here, I believe, as what was used or put into the operation during that month, government form No. 1598.

Q. Then the 4.43 is not a true average cost of purchases for Hedgeside; it's merely an arbitrary average taken under your contract, is that right?

(Testimony of Earl Johnson.)

A. No, no. The average cost is presumed to be a weighted average cost and in order to determine a weighted average cost, you have not only the purchases which are made within a specified period, but you have what is on hand and available at the beginning of that period.

Q. And where is that in this sheet?

A. In this one it so happens that this is the first production and I believe that in the contract there was certain grain on hand but we don't have it here so there couldn't have been any on hand at the beginning of this here production period. I'm not certain about that without referring back. Here, our starting item was a purchase made on 10-16-47 and delivered to Hedgeside on October 29 and 30. I mean, this was supposed to be all of the grain which was used or was available for use at the time of the contract or at the time of this period of [831] production.

Q. Well, if you took the average cost at the top of the column, assuming there was—opposite the item inventory, October 13 '47 per contract, presuming there was an inventory on hand, you would have taken the weighted average as obtained from the previous month, wouldn't you?

A. That's correct.

Q. Then you would have added that to the total for this month?

A. Yes.

Q. Then you wouldn't have a true weighted average, would you?

A. It would be true weighted average, yes. Yes.

(Testimony of Earl Johnson.)

Q. That's all right, I just wondered. In Schedule 1-b, the information there is obtained from government form 1520.

A. That's right.

Q. That is government form 1520 at Hedgeside.

A. At Hedgeside.

Q. At Hedgeside.

A. That's correct. On Schedule 1-a, the form 1598 is also at Hedgeside.

The Referee: Q. Before we pass this, Mr. Johnson, for my information, getting back to this 1-a, you arrived at that rate per hundred weight by dividing the number of pounds into the amount of dollars, didn't you?

A. That's correct.

Q. Exclusive of any inventory or anything else that might be [832] on hand.

A. That's correct, because your ending inventory which on here you have—the bottom figure, the inventory at October 31, 1948 per form 1598 is also at that same average. That will be carried over into the subsequent month's production or available for the subsequent month's production.

Mr. Fisk: Q. And you divide the number of pounds and then divide that by a hundred to get a hundred weight?

A. Yes, a hundred weight. It's merely a placing off of decimal points.

The Referee: All right, Mr. La Shelle.

Mr. La Shelle: Q. Now, following down here in the lower lefthand corner you have already explained total available or average cost. Now, you

(Testimony of Earl Johnson.)

have "less grain used per 1598 and average cost" is that 1598 the 1598 government form of what went into production? A. That is correct.

Q. And then you have the inventory October 31, 1947, per form 1598 and average cost, is that what was left over at the end of the month?

A. That's correct.

Q. And that's what you had put out as a starting figure for the month of November.

A. For the subsequent form that would appear on the form 1598 at Hedgeside at the beginning of November.

Q. Now, on the lower lefthand corner, you have 1 and 2. [833] Would you explain what that is for the Court?

A. No. 1—under delivery date of grain, there was certain grain delivered by the Napa Milling & Warehouse Company with drayage charges of \$64.76 (I've got a note when) calculated at 10 cents per hundred weight, pending the receipt of the invoice and note, so we have drayage charges \$74.24 under malt which, as I say, was per phone advice. When there's deliveries made right at the close of the month, for purposes of accounting, we set up or we term unrecorded liabilities, which are not fully established at that time. We don't know exactly what the charge will be. So we determine from the best source available what the rate is expected to be and then that would be adjusted when the actual invoice comes in.

Q. The following month.

(Testimony of Earl Johnson.)

A. In the following month in this case.

Q. All right, now taking your next schedule, which is Schedule 1, you go down that by columns and show to the Court so it won't have to study the whole thing, what is carried over here from Schedule 1-a and 1-b, if anything, and how this is set up.

A. Well, for purpose of explanation, I think it might be better to start with Schedule 1-b; from Schedule 1-b we determined that the total October production was 37,192.13 proof gallons—original proof gallons. That figure is carried over to the center of Schedule 1 and shown as total October production applicable to grain used. "See Schedule 1-b attached, [834] 37,192.13 OPG." Again that figure will appear at the bottom of Schedule 1 as yield of 37,192.13 OPG's.

Q. Just let me stop you on that yield for a moment. The contract, for the purpose of getting a price specification, that runs up a certain yield, is that right?

A. For determining the price paid at the time of invoicing it specified that there would be a price paid in accordance with the terms of the contract. The yield, the actual yield from the production could not be determined until after the month's production had been completed and that figure is shown down here. That will show on the schedule of how the yield was determined.

Q. Now, as you complete the explanation there, I might state, your Honor, that I realize that these

(Testimony of Earl Johnson.)

schedules speak for themselves but it almost takes an accountant to understand them.

A. Well, in Schedule 1-a we determined the amount of grain which was used per form 1598 at average cost. Under "milo" on the next to the last line, we showed that there were 602,940 barrels at an average cost per hundred weight of 4.03083, a total of \$26,715.25, under malt showed that there were 59,950 barrels at an average cost per hundred weight of 8.24651, having a total amount of \$4493.78. Those figures are carried over onto the first money line of Schedule 1 and the line shows two vendors per form 1598, so the figures on that line under milo and malt are the figures which are carried [835] over from Schedule 1-a and the total value shown in the last column on 1-a against that line merely totals the amount columns of the other two sections. Then again, determining an average inventory cost, we would start out with the beginning inventory, of which there was none available. That's shown "plus mash inventory 9-30-47," and we have less March inventory 10-31-47 and again under the sections milo and malt, the inventories in those, number of pounds, the 159 thousand at the average cost 4.43083 and the amount is \$7045.02. Under malt we had a remaining inventory of 15,797 barrels with an average cost of 8.24651 per hundred weight, the amount \$1302.70. We have a total value or a total of the amount columns under milo and malt. So that the total consumed would be our total available for production, less the inventory which is on hand at

(Testimony of Earl Johnson.)

the close of the operating period. So by deducting the figures which I have quoted underneath the underscore, we show total consumed. Should I read the figures again or can I by reference?

Q. Yes.

A. Well, the figures under milo leaves a remaining balance for consumption of 443,940 barrels at the average cost or rate of 4.43083, total amount \$19,670.23, under malt, number of pounds 44,153, the average cost per hundred weight 8.24651, the amount \$3641.08, the total value consumed of \$23,311.31 is the total of the corresponding figures in the amount columns under milo and malt.

Q. Now, on this part here, where you come down to the [836] "chargeable cost per proof gallon," would you run down that with Court and counsel and explain how that's set up?

A. Well, we had this column I have already quoted, the figure of 37,192.13 original proof gallons. We have determined that from Schedule 1-b attached. The material cost per original proof gallon that is determined by taking the total value consumed of malt and milo which we have already determined as 23,311.31 and dividing that by the number of OPG's; that gave us an average cost per OPG of .62678.

Q. That would be cents.

A. Cents, that's right. Then by referring to the contract, our conference allowance for beverage spirits was 12½ cents per original proof gallon. So that the total chargeable cost per OPG for beverage

(Testimony of Earl Johnson.)

spirits would be the total of the two foregoing figures of .75178. Now, again by reference to the contract, there was a differential between spirits produced for beverage purposes and spirits which were acceptable only for redistillation purposes and the two figures were quoted 12½ cents and 5½ cents so that in order to determine the figure which would be allowable as chargeable cost per OPG for spirits to be redistilled. The differential between the 12½ and the 5½ cents was 7 cents. That would be deducted from the cost which was allowable for beverage spirits and we determined from that that the chargeable cost per OPG for spirits to be redistilled would be .68178.

Q. Now, are some of these carried forward now into schedule [837] or Exhibit A?

A. Exhibit A is the final summary schedule covering costs for the month's audit.

Q. Now, will you kindly do this? Take this by column numbers, telling us first, from what source this information was secured, whether a Schenley invoice, Schenley record or Hedgeside, or whatever came about, and then explain this to the Court the way you have the other schedules.

A. During each month's production, we received invoices from Hedgeside Distillery Corporation billing Schenley for the spirits which were accepted for either beverage or redistillation purposes and we paid to Hedgeside Distillery Corporation through the sight drafts which we have already shown, the amounts shown on these invoices. Now, part of our

(Testimony of Earl Johnson.)

support of the payment during the month of production or when, as and if it was accepted by our production department, those invoices supported our voucher copies in our accounts payable department, either in New York or in San Francisco. By reference to those voucher copies, we could determine what had been expended or what had been paid to the bank or through the bank to Hedgeside for those spirits which were turned over to us on warehouse receipts during the month or which were supported by those. We obtained the copies of those invoices or took the vouchers and from those invoices the information on Exhibit A pertaining to the invoice number and date which would be a Hedgeside invoice, the serial numbers which were proved, the number of [838] packages, which would be barrels or drums which were covered on that invoice, the number of original—

Q. Now, just let me stop you for a moment. I notice that most of them are for beverage and then there's two packages, 40 and 47 for redistillation.

A. That's right. Then the number of OPG's which were shown on those respective invoices for the number of packages, the unit cost per OPG for beverage purposes per Schedule 1. On Schedule 1 we determined that the price to be paid for beverage spirits was .75178, the eight we carried it out, we dropped the last figure, so there's .7517, the amount for beverage purposes, therefore, would be the number of OPG's which were accepted for beverage spirits times the .7517 and that figure is extended in

(Testimony of Earl Johnson.)

are amount for beverage purposes. Now, again in the next column, the unit cost per OPG for redistillation per Schedule 1 refers back again to Schedule 1, we determined there that the total chargeable cost per OPG for spirits to be redistilled was .68178, dropping the last digit, determined there that it was .6817. Now, the last two items on Exhibit A shows that there were 40 packages and 47 packages containing 4,032.40 and 4738.07 OPG's respectively, which were spirits which were accepted for redistillation. By taking the number of OPG's just quoted, times the unit cost as determined .6817, and extending that into the next column, we show the amount for redistillation. That is the amount which should have been paid or which was the acceptable cost for spirits for redistillation purposes. We have [839] then a column called the total amount, where one figure is only shown, and that is the totals of the total amount for beverage spirits and the amount for redistillation spirits. The next column termed "total amount per vendor's billings" refers back again to the Hedgeside invoices, the numbers and dates of which show in the next column. The total amounts which were actually paid during the month by Schenley, starting out with \$2737.83 and totaling in that column \$14,322.76 is the amount which was actually paid during the month as provided for in the contract, to Hedgeside. Now, if determined through these exhibits and supporting schedules that the amount which should have been paid for that production on the cost for-

(Testimony of Earl Johnson.)

mula which would have been \$15,555.33, the difference between the two columns showed that the net amount to vendor for this respective production, it's broken down individually, but the total amount was \$1232.57. By referring then to the letter I prepared summarizing this, I showed in the last paragraph of the letter that a check in the amount of \$1232.57 has been drawn and paid to Hedgeside Distillery Corporation to liquidate the amount.

Q. The net amount.

A. The net amount due the vendor as set forth in Exhibit A. That is supported by the copy of the cancelled check which was drawn to Hedgeside Distillery Corporation, the copy of the voucher, and the copy of the check request which was issued as a result of this audit. [840]

Q. Now, you mentioned a copy of the check, isn't that the original cancelled check?

A. Well, no, it's the original cancelled check, I'm sorry.

Q. Now, the rest of these groups in this, what is it—54? A. 54.

Q. 54 for Identification also have these audits prepared in a similar manner, do they?

A. Yes.

Q. Under your personal supervision?

A. That is correct.

Q. And putting check No. 07108 and those attached papers aside for the moment, could you just run through the balance of those and state whether or not there is anything that needs any explanation

(Testimony of Earl Johnson.)

or any change in the audit or do they follow the same circumstances?

A. Well, take the very next one——

Q. Let me ask you this: You wouldn't get the same cost each time, would you?

A. No, no, I would not.

Q. That would depend upon the cost of grain?

A. It would depend on the yield, the cost of grain and the amounts which were paid to Hedge-side during the month.

Q. What I am getting at is you wouldn't find the same cost per OPG on each one, would you?

A. No, it would be very unlikely that you would have the same cost per OPG.

Q. Now, these attached papers, do they all contain a [841] Schedule 1-b, 1-a, Schedule 1 and Exhibit A and then a letter by you summarizing the schedules? Have they all got that?

A. I believe they do.

Q. Will you just run through them and check them for a moment?

A. Yes, they contain——

Q. They all have the same schedule. Now, referring to the check next in order in this group and the documents in back of it, on your summary to Evers from yourself, at the bottom it would appear that in that particular month, for November, there was a credit of \$342.61, as set forth in Exhibit A. In other words, Exhibit A here shows an overpayment.

A. That is correct.

Q. According to the audit.

(Testimony of Earl Johnson.)

The Referee: What check number is that?

Mr. Fisk: Check next in order is 08549.

Mr. La Shelle: Yes, I keep reading the wrong number. However, there is a check in the number Mr. Fisk just stated for \$457.50 and will you explain to the Court that setup, please?

A. Well, we found from past dealings with the Hedgeside Distillery Corporation that if they owed us money we often had difficulty in collecting it. It would sometimes take us for three or four months to collect a very small item, when we were paying them thousands of dollars, so that if we got a credit item, we always had, in addition to the audit payments, [842] we had payments for warehousing charges, etc., up at Hedgeside. And, in order to make sure that we would not have on our books an accounts receivable from the Hedgeside Distillery Corporation, in payment of all storage bills and so forth, we would apply the credit determined by audit against the payment of any storage bill. So that in this case, we had, as of the end of November, we had storage charges, accrued storage and handling charges for which we had received an invoice from Hedgeside, for \$800.20 and actually we had a credit determined by audit of \$342.61, which Hedgeside owed us. So we applied against the invoice for \$800.20 the credit of \$342.61, giving us a net payment due Hedgeside of \$457.59, for which amount the check was drawn.

Mr. Fisk: Q. Was that pursuant to your contract of October 13, 1947.

(Testimony of Earl Johnson.)

A. No. Not the additional payments which were in there.

Q. I mean, that practice is not a part of the contract. A. Oh, no, no.

Mr. La Shelle: Q. Now, on the third check, No. 09514, dated January 16, 1948 from the summary there, there was an amount of \$2536.72 due. There was no credit there, is that right?

A. There was no credit. The check was drawn for the full amount and paid to Hedgeside.

Q. And the adjustment there was arrived at in the same manner.

A. In the same manner as the first.

Q. As the first audit you explained. And the next check, [843] No. 10930, according to the summary of the audit, which was a credit of \$75.72 and the cancelled check is in the amount of \$332.63 and I take it from that that you used the same offset method that you just testified to before?

A. That is correct.

Q. And does that show by the Bill Correction Memo? Would you explain that to the Court?

A. Well, when we have a credit item, we have invoices for which there is a credit to be applied, generally there is a supporting document issued by the Accounts Payable Department which shows that the credit is being applied against other bills rather than as a payment or as a request for payment from the vendor. So that in one instance, a request for payment or a Bill Correction Memorandum issued by Schenley to a vendor would result in an accounts

(Testimony of Earl Johnson.)

receivable on our books. A bill correction memorandum is a charge-back to the vendor which is applied against other charges made by that vendor, so that we pay a net amount and we have other accounts receivable shown on the books.

Q. So this \$333.63 was storage or other charges, less the credit.

A. That is correct. There's two copies of invoices which show that we had certain storage charges and the accumulation of those storage charges, less the amount of the credit which was determined on the basis of this audit, was paid to Hedgeside Distillery Corporation.

Q. And on the next one, Check No. 12171—

Mr. Fisk: Just a minute, before you pass that. Are those Hedgeside invoices?

Mr. La Shelle: What do you mean by "those"?

Mr. Fisk: The last two documents the witness testified to.

The Witness: They were copies of—copies made up in our office of the Hedgeside invoices. The originals of these have been transmitted to the New York office.

Mr. Fisk: Q. Well, is that a copy, a true copy of the vendor's invoice? A. No.

Q. Or is it just your idea of all the contents of the vendor's invoice. A. We—

Q. In other words, isn't that from a Schenley's form?

A. It's a Schenley's form, that's correct.

Mr. La Shelle: Q. These invoices that you re-

(Testimony of Earl Johnson.)

ferred to here, are those the invoices that have been attached to the warehouse receipts?

A. No, no.

Q. Well, what invoices are they? I don't understand that myself.

A. The invoices which are referred to here where I have copies of the vendor's bills.

Q. Oh, those were storage bills.

A. Those were storage bills.

Q. Oh, I see. [845]

A. And the originals of those bills, the other copies which we received for storage charges by Hedgeside Distillery Corporation, were forwarded to the New York office.

Q. I see. I was all mixed up there myself.

Mr. Fisk: Just a minute. I'm mixed up still.

(Discussion off the record.)

Mr. Fisk: Q. That document that you referred to as the Schenley's form, entitled "copy of vendor's bill" dated January 31, 1948 purports to be a summary of storage charges of both Mountain View and Hedgeside. A. That's correct.

Q. And it also covers handling of grain of both Mountain View and Hedgeside.

A. That's spirits grain. That's the merchandise.

Q. Yes, the spirits grain.

A. The spirits grain.

Q. Well, this is in no sense a copy of any—a true copy of any invoices that have been furnished you by anyone, is it?

A. Oh, yes. It's not a pro-forma copy or any-

(Testimony of Earl Johnson.)

thing, but it contains the information maintained or carried in our San Francisco files for certain original documents of which we only had one which were forwarded to the New York office.

Q. In other words, this is made up in Schenley's office from data that Schenley had.

A. No, it was made up in Schenley's office from the original copy. [846]

Q. How do you know?

A. Because that's standard practice.

Q. Well, you have never seen those invoices, have you? A. Oh, yes, I have.

Q. Do you have a personal, definite recollection of them now?

A. Of these particular invoices, no. I couldn't say that. But I have, on numerous occasions, seen them.

Q. And, of course, that goes back—it covers a number of months. This is a memorandum, a Bill Correction Memorandum, dated February 18, 1948 and it covers back as far as October, 1947.

A. No, that bill correction memorandum dated February 18, 1948 merely supports the audit papers. The other two items are copies of the bills which were rendered to us by Hedgeside for certain storage and handling charges.

Q. Yes, but storage charges that run back as far as through October '47. A. That's correct.

Q. So this isn't a credit memorandum or an adjustment memorandum of each month's operation. It's just a credit memorandum of past operations.

(Testimony of Earl Johnson.)

A. No. No, the credit memorandum, this Bill Correction Memorandum, merely covers the one month's operations. That is issued to support the audit report. It's merely a document maintained in our accounts payable files along with this copy of the audit report. The other two documents might mean— [847] might be anything charged by Hedgeside which if we found it were an acceptable charge, we could apply this credit memorandum against.

Q. Well, let me see if this is a fair statement. Then I won't ask you any more questions. As you made up each one of these monthly audits, Schenley always made a point, if it came to its attention, to see to it that there was no credit coming from Schenley to them. In other words, they always—I mean, from Hedgeside to them. They always kept on the black side of the ledger, is that right?

A. That is correct.

Q. No matter how far back it went or what it covered, if they knew of an item that was due to them from Hedgeside which would make a credit or which would make an obligation outstanding in Hedgeside to them, why they would issue this memorandum to do away with it. A. That's correct.

Mr. La Shelle: Q. In other words, as I follow you, whenever there was a credit due under the audit, you looked for something for an offset.

A. To apply that against, that's right.

Q. So that you wouldn't have receivables on your books. A. From Hedgeside.

(Testimony of Earl Johnson.)

Mr. Fisk: Q. Was that applied on a Hedgeside bill? It was applied to an obligation of Franciscan, too, is that right?

A. The invoices, as we received them, were Hedgeside invoices [848] covering storage of certain items. I didn't pass on these particular items. I probably would have if I'd have had them. But if we had certain barrels of merchandise for which we were rendered storage charges by Hedgeside and we knew that we had them in these certain warehouses and we weren't getting any duplicate charges from anybody else, that would be up to our bulk merchandise department to designate passage of those charges and we would pay this normally.

Q. While you're on that subject, your audit sheets show who was the vendor of the grain. It doesn't show who was the purchaser of the grain or the recipient.

A. Well, the recipient of the grain in all production at Hedgeside, would be Hedgeside.

Q. You mean, that's your statement. But your record doesn't show that.

A. I mean, there's certain things we understand as we go along. These reports——

Q. Well, I think if you look through the Franciscan that isn't true.

A. Oh, yes, I think you will find——

Mr. Fisk: All right.

Mr. La Shelle: All right, we're through with this now.

Mr. La Shelle: Q. Now, the next one is check

(Testimony of Earl Johnson.)

No. 12171, which according to the summary there was no credit here; there was an amount due of \$1999.84 and that was the amount of the check so there [849] would be no credit due there.

A. That's correct.

Q. And then the audit was made in the same manner and set up in the same way as you previously testified on the first check.

A. That's correct.

Q. And then on Check No. 13520, (this seems a lot quicker)—

A. You have got two of them there.

Q. Oh, I'm sorry. 13520, according to the summary letter there was no credit due but an amount due of \$2489.35, which is the amount of the check and was this made up the same way you testified as the first audit papers? A. Yes.

Q. Then on the next check, No. 14599 (there is a lot of stuff here) perhaps you better take a look at the letter of summary here and explain that to the Court.

Mr. La Shelle: Short recess all right, Your Honor, for a few minutes?

The Referee: Fine.

(A brief recess was taken.)

Q. Showing you the last check in this group, 54 for Identification, No. 14599, referring to the summary of the audit, I note from the summary that this was the final audit, is that right?

A. That's correct.

Q. And was there a credit on the audit here?

(Testimony of Earl Johnson.)

A. We determined that we owed Hedgeside an additional \$441.91 for the production. No, that's wrong. They owed us—as a result of the production, they owed us \$441.91. [850]

Q. Now, I notice a check here again is in the amount of \$1500.39 and did you take offsets there as you have testified before?

A. Yes. At the time that this audit report was put through, it was found by our accounts payable department we had several other charges made by Hedgeside for storage and handling and the accumulation of those bills was made and the credit was applied against that.

Q. Is that shown in the summary there?

A. That is.

Q. And this group here, of Petitioner's Exhibit No. 54 for Identification, we offer these in evidence now, Your Honor, as Petitioner's Exhibit in evidence, No. 54.

Mr. Walsh: Your Honor please, on behalf of the trustee, I am going to object to the introduction in evidence of these documents designated as Petitioner's No. 54 for Identification on the grounds that the proper foundation has not been laid and on the further ground that these documents in no way tend to prove or disprove any of the issues in this case, on the further ground that the testimony of the witness, some of the evidence that was set forth in these various documents, is not the original evidence. It is evidence that is secured from original documents which are not attached to the vari-

(Testimony of Earl Johnson.)

ous documents. Now, the witness testified that some of that documentary evidence is secondary. His testimony is that the original documents are either at the Hedgeside [851] Distillery or in the office of Schenley in New York.

The Referee: Well, before we get to Mr. Fisk, let's take Mr. Walsh's objections one by one. The witness did testify that some of these documents were computed by Hedgeside from original documents received from Hedgeside, which original documents were forwarded to New York, isn't that correct?

Mr. Ward: Pardon me, Judge, you said "computed by Hedgeside."

The Referee: I mean, computed by Schenley, by your office in Schenley's.

The Witness: That is correct.

The Referee: And the original document that Schenley received was sent to your New York office.

The Witness: Might I explain that, Your Honor?

The Referee: Before you explain it, let's get all of the documents that we are referring to so we will know what we're talking about here. For instance, let's take "copy of vendor's bill."

Mr. Walsh: Attached to what check, Your Honor?

Mr. La Shelle: What check number?

The Referee: That's what I am going to get. Which is attached to No. 10930, and the document that I am referring to is dated January 31, 1948 and the title of it is "copy of the vendor's bill."

(Testimony of Earl Johnson.)

Now, am I correct in stating that certain of the information on that particular [852] document is made up of an original document that is not attached to this exhibit.

The Witness: That is correct.

The Referee: And the original document was received by Schenley and it's either in your New York office or in any event, it's not here now.

The Witness: That's correct.

The Referee: And the computation or the collection of data that appears on this January 31, 1948 data was prepared from some other document or group of documents.

The Witness: That's right.

Mr. La Shelle: I don't think so, Your Honor, and perhaps I haven't made myself clear. The purpose of this evidence is simply to show that Schenley made the payment to Hedgeside required under the contract; the contract which is in evidence of October 13, 1947, called for estimated invoices as they came through, which are in mostly these other exhibits, and then the contract provided for an audit under a certain price summary which the witness has explained, which is the average cost of grain, plus 12½ cents a proof gallon for beverage spirits and 5½ cents a gallon for redistillation. Therefore, monthly this audit was made and those costs were determined and offset against the total amount under the contract, was the amount paid as the [853] invoices came through on the partial payment as provided for by the contract. So there

(Testimony of Earl Johnson.)

might be a net amount to Hedgeside or there might be a credit. The estimates made as they were, in a few instances, they were overpaid.

The Referee: I appreciate that, Mr. La Shelle, but who did the calculating?

Mr. La Shelle: Mr. Johnson.

The Referee: And where are the original documents that he used in his calculations?

Mr. La Shelle: Well, Your Honor, this was made up in the regular course of business as an audit, not made up for this litigation; it was made up at the time from 1598, from 1520's, from the invoices in question, together with the partial payment from their costs of grain and everything and is admissible under the Business Records Act.

The Referee: Well, isn't the trustee and the Anglo Bank entitled to examine the documents that go to make up this calculation that Schenley's have made?

Mr. La Shelle: No. If they have any evidence to show that this did not constitute total payment, they can show that. But this is an audit made up in the regular course of business and one of the reasons for the Business Records Act making these admissible, is the great trouble, the time and cost and expense, and in some [854] instances, the impossibility of getting all of these documents and putting them in.

The Referee: Well, these documents are in the possession of petitioner.

Mr. La Shelle: Yes, but that is a document

(Testimony of Earl Johnson.)

which simply supports, for accounting purposes, their audit, and that was taken solely for an offset. The amount due was a credit in favor of Schenley and they didn't want a receivable on their books so they looked around for an offset. Now, the cancelled check shows that it was cashed and accepted by Hedgeside. Therefore, as between Hedgeside and Schenley, that's certain evidence that that was sent to them.

The Referee: That's not binding on the trustee and the creditors and the bank, is it? The check, in the final analysis, as I understand it—I can be wrong, but the check in the final analysis is only the result of certain calculations made by the accounting department of Schenley's. And they either gave him a credit or they gave him the full amount or gave you credit for an offset that they maintained that Hedgeside owed them. Now, to make up the copies of this vendor's bill that I have referred to, Schenley's had an original invoice. They may have made other original documents. This amounts to me nothing more than a summary.

Mr. La Shelle: This amount here, if you look at the schedule—I'm not an accountant myself—if I'm not mistaken, on Exhibit A invoice number and date, those are the invoices which are here in evidence.

The Referee: Are all those invoices in evidence that are listed?

The Witness: No, because there's some of these items have been used since the date of production.

(Testimony of Earl Johnson.)

The only thing we have in evidence is what is actually on hand in IRBW No. 2 at the present time.

The Referee: Just a minute, then. Let me ask Mr. Johnson a question. You take a look at this copy of the vendor's bill dated January 31, 1948 that is attached to the papers in the group check No. 10930 and tell me whether or not there are any original documents that were used in arriving at the information appearing on copy of vendor's bill that are not now in evidence in this proceeding?

A. Yes. Now, I might explain that, Your Honor.

Q. In making up the audit papers, the figures which we determined on this summary of auditing is the important figure pertaining to this contract. The other invoices or copies of support here which are shown in support for this particular payment have no connection with the contract. They're merely incidental to that, Your Honor.

Mr. Fisk: Just a minute, Your Honor. I don't think that is a proper statement. He is trying to give [856] us the law now.

The Referee: Now, here, I think that the practical answer is this. That in the event that this copy of vendor's bill and any other exhibit, without looking at them all particularly, but I know about this one—in the event that they're not necessary to prove the petitioner's case, let's eliminate them from the proceeding, but I think that the objection is good where there is an attempt to put in secondary evidence when the petitioner itself has the original documents in its file by the witness' own testimony.

(Testimony of Earl Johnson.)

Mr. La Shelle: Let's get at it this way, Your Honor, just as a matter of discussion.

The Referee: Go ahead.

Mr. La Shelle: On the cases, take check No. 07108, where there is no—they didn't utilize any offset method, there you have simply a check, the voucher, the check, the summary of the exhibits, and the various schedules and the summary shows that they have \$1232.37 coming and that is the amount of the check. Now, solely for the purpose of illustrating, that is admissible. There is no offset involved there. Now, if that is admissible under the Business Records Act, the fact that they took an offset doesn't change the admissibility of showing the amount due under the contract and if they paid it in that fashion, it still comes under their business [857] records. In other words, the only thing here which appears to you apparently, this has to do solely with the offset because they looked for an offset, they had a credit coming for it, they found this as an offset, as Mr. Johnson said, they didn't want to have the Hedgeside receivable on their books so they just deducted it, but that does not change it, in my opinion, any different from check No. 07108, because as Mr. Johnson pointed out, the important thing here is the net credit or the net amount due as shown in the summary of the audits. Now, in this case of 07108 there was no credit due; they owed Hedgeside money, so they sent them the full amount. Now certainly, check

(Testimony of Earl Johnson.)

No. 07108 and supporting documents are admissible under the Business Records Act and——

Mr. Walsh: May I——

The Referee: Just a minute, Mr. Walsh. Are you finished on that, Mr. La Shelle?

Mr. La Shelle: Yes.

The Referee: Let's just assume for the purpose of our discussion here and that's all it is, is a discussion, that instead of having a very involved case here, that the trustee and the bank only have one transaction. I mean, that's the entire case, made up of the goods listed in these accompanying documents on 10930, check including the supporting documents. Now, that's all [858] there is. There's no other matter concerning the trustee or Schenley's or the Anglo Bank. Is it your contention that they would not be entitled to see the original documents that make up this copy of the vendor's bill where Schenley has made their own calculations?

Mr. La Shelle: Well, you mean, there was no contract like——

The Referee: Let's say there is nothing else, that this is the whole case and you are offering these documents in evidence. Now, is it your contention that the trustee and the Anglo Bank would not be entitled to see the best evidence that goes to make up those documents?

Mr. La Shelle: Well, in that case, such a thing couldn't exist because you can't have an offset unless you've got a credit.

(Testimony of Earl Johnson.)

The Referee: Let's say then that they had one contract and there was only one transaction.

Mr. La Shelle: And that they were trying to prove——

The Referee: And you were trying to take credit for those items on there, that Schenley on their own calculations in their own audit department were responsible for and the trustee and the Anglo Bank said: "Well, let's see the original documents; let's see the original invoice; let's find out whether or not that much goods were shipped to Schenley," and so forth. [859]

Mr. Ward: If I may be heard on that, Your Honor, if we were attempting to show and there was some issue as to whether or not there was an offset or whether or not these other bills that the offset was taken on was involved in this case in some way, what you say would be true. All we are attempting to show is that a final check was drawn in payment and was accepted by Hedgeside for certain whiskey. The fact that we deducted from that check some money they owed us because of some other bills, we don't have to bring in all the other bills to show why that deduction was made. The fact is a deduction was made and apparently accepted by Hedgeside, the ultimate issue being, did we pay them, not the ultimate issue being are there some other bills here as yet paid or unpaid.

The Referee: Would that be binding on the trustee and on the bank? For instance, to take the extreme case, supposing that Hedgeside and Schen-

(Testimony of Earl Johnson.)

ley were in the layman's language "in cahoots" with one another and they had already issued warehouse receipts to the bank, whether they were duplicate receipts or original receipts or secondary receipts or anything else, and then subsequently they went into bankruptcy. The mere fact that Hedgeside had accepted the check that is the basis of these documents, would you say that precluded the bank and the trustee from going into an examination of [860] the original documents that were to make up the check, even though Hedgeside accepted the check in payment or would they be entitled to see on what basis those calculations were made?

Mr. Ward: I think if they have any suspicion of that sort, they would be entitled to subpoena those records, but I don't think that would have any relevancy to the admissibility or non-admissibility of an audit report prepared in the regular course of business and submitted as such.

The Referee: Then following your statement, Mr. Ward, why then are these particular supporting documents important in the case at all?

Mr. La Shelle: I think, your Honor has got your fingers on it and I was about to say this. I think that our offer of evidence—I am thinking out loud here—should be limited to these groups where the audit shows an amount due and a check in that amount. The evidence on the other groups should be limited to the audit showing we had a net credit and overpaid the goods and the rest of the stuff not go in because as for as the bank and the trustee are

(Testimony of Earl Johnson.)

concerned, if we overpaid it, why it doesn't make any difference, but the audit shows we more than fulfilled our obligation under the contract. In other words, the audit is the important thing—is the audit figure. [861]

The Referee: Yes, but, Mr. La Shelle, your audit figure is based on certain original documents, isn't it?

Mr. La Shelle: No, no, the audit—the amount of net credit or the amount due is not based in any manner, shape or form upon this vendor's bill. It doesn't play any part in it, because that was used as an offset. In other words, the audit shows in this particular case, that Schenley had a net credit of \$75.72; under the contract they had overpaid to that extent in that month.

The Referee: Now, let me interrupt you. Let's stop a moment. How would Schenley know that that figure there—just a minute, now, where did they get this figure \$75.72?

The Witness: Your Honor, if I may——

The Referee: Surely.

The Witness: That figure would be from copies of vendor's invoice. Now, some of the copies——

The Referee: Now, stop there. Now, where are the vendor's invoices?

The Witness: The copies of the vendor's invoices——

The Referee: Never mind the copy. Where are the vendor's invoices?

(Testimony of Earl Johnson.)

The Witness: These would be in the files of Schenley.

The Referee: Where?

The Witness: Either in the New York office or in San Francisco. [862]

Mr. La Shelle: Some of them here.

The Witness: Now, some of them are in here.

The Referee: And others are not.

The Witness: The only ones which would be in here would be the ones where the spirits are presently in storage in IRBW No. 2.

The Referee: But some of them are not.

The Witness: Some of them are not.

The Referee: And this \$75.72 figure that Mr. La Shelle and you and I are talking about now was arrived at by the use, in some instances, of invoices that are not here in court.

The Witness: That's correct.

Mr. Fisk: Your Honor, may I interrupt? This is related to the objection that I am going to make or an extension of Mr. Walsh's.

Mr. Fisk: Q. These audits, Mr. Johnson, that you made here, they are the audits that you made in settlement of your monthly account under the October 13, '47 contract with Hedgeside, isn't that correct? A. That's true.

* * * * * [863]

The Referee: Now, just a minute, Mr. Walsh. Mr. Johnson, are you familiar with other documents in this exhibit that's under discussion?

The Witness: Yes.

(Testimony of Earl Johnson.)

The Referee: Tell me all the sources of information [889] with reference to these documents. In other words, whether it's an audit made by you people or whether it's a corrected bill or what it is. Tell me what is the source and the various sources of information that appears in this exhibit.

The Witness: Well, in any of the exhibits, there would be three prime sources. First, there would be the documents which were made or supported the payment made to either Hedgeside or Franciscan during the month in which the merchandise was produced and for which we were billed as Schenley Weekly—

The Referee: Wait a minute, now. Go on, where is that information?

The Witness: Well, that would be—

The Referee: No, I don't mean in here. I mean, the original document.

The Witness: That's in the files of Schenley Industries, Inc. at the present time.

The Referee: Where?

The Witness: Either in New York or in San Francisco.

Mr. Fisk: And what documents? Enumerate them. There's only three.

Mr. La Shelle: Now, wait a minute. Just let's have this understood. The Court is questioning. Let the Court ask the questions and then let Mr. Fisk ask some later. [890]

The Referee: Well, I would accept Mr. Fisk's offer because it's on the same point that the Court

(Testimony of Earl Johnson.)

had in mind. I'm trying to get what are the basic sources of information and two, where are the basic sources of information located.

The Witness: Back in each payment which is made and shown in these documents are the groups of exhibits which have been previously put into evidence, consisting as I stated before, of the basic contract, the copy of the warehouse receipt, the copy of the cancelled check and the—and when I say copies here, I mean, generally, the originals. My terminology may be wrong. And the vendor's invoice. Those four basic payable documents have supported all of the items which are shown as payments here up to the final audit payment. Those are in the files of Schenley Industries, Inc. either in New York or in San Francisco as I have previously testified.

Mr. La Shelle: May I ask a question here, along the lines of Mr. Fisk?

Mr. La Shelle: Q. Are those also in the possession of Hedgeside? A. No.

Q. In other words, when you made the audit, did you check Hedgeside's invoices, too?

A. At the time that the audit was made, there were copies [891] of the vendor's invoices which had been submitted to Schenley and for which payment requests were made to Schenley. Those copies were available in the files of Hedgeside or Franciscan and were used at the time of audit as a check against the information which we had.

Q. In other words, as I get it, you wanted to see

(Testimony of Earl Johnson.)

if the invoices in Schenley's possession tallied or balanced with the invoices in Hedgeside's possession at the time of the audit.

A. That is correct. In other words, Schenley would have certain documents which were not available at Hedgeside or Franciscan. Franciscan or Hedgeside would not have the cancelled check, they would not have the original of the invoice nor would they have the original of the warehouse receipt, but at Hedgeside they would have copies of the invoices which had been submitted to Schenley at the time of the original request for payment.

The Referee: Let's stick with my original question.

The Referee: Q. Now, you state in here where government form so-and-so was used. Was it?

A. Yes.

Q. Where is that form?

A. At either Hedgeside or Franciscan.

Q. Now, what other information did you use?

A. Form 1520, the government form 1520 is on the premises of either Hedgeside or Franciscan and were used at the time of [892] our audit and were in our possession at the time of our audit.

Q. What other documents were used?

A. The copies of the vouchers and so forth issued by Hedgeside and Franciscan in payment of certain grains and so forth used in the production.

Q. And where are those documents?

A. Those are on the premises of Hedgeside or Franciscan.

(Testimony of Earl Johnson.)

Q. All right. What else in arriving at the audit?

A. In arriving at the audit, that's all I can think of offhand.

Mr. La Shelle: I think you mentioned contracts.

The Witness: Yes.

Mr. Fisk: Q. What about sight drafts?

A. Sight drafts. At the time of the payment—now, there would be no sight drafts in connection with the particular documents which are now in question. The sight drafts—all sight drafts covered the original payments which, under the contracts, were termed partial payment during the month of production. Those, as I have stated before, I have endeavored to locate and have not been able to except in certain few instances where we obtained them from New York. The copies of those sight drafts, I don't know. We did not have to use those at the time of the audit.

The Referee: Q. There's no sight drafts—

A. There's no sight drafts in there.

Q. In this 54. A. No.

Mr. Fisk: But this 54, your Honor, is a summary of the partial payments that they made pursuant to sight drafts or invoices as the case may be, or both. In other words, this is just a balance of the sum that he claims they owe.

Mr. Fisk: Q. But this audit includes an examination and a summarizing of those other records, to-wit, the partial payment, the check, the sight draft, the invoice, and the warehouse receipt.

A. That's correct.

(Testimony of Earl Johnson.)

Q. Those all support your partial payment.

A. That's correct.

Q. Now, these other documents are, the supporting documents are merely government form 1520, government form 1598—

A. The Hedgeside or Franciscan invoices. That is, the vendors, or payments made to vendors, by Franciscan or Hedgeside.

Mr. Fisk: That's right.

Mr. La Shelle: Q. That's for grain.

A. Yes, for grain.

Mr. Fisk: Then, on the basis of that, as far as the partial payment is concerned, I assume that your partial payment documents are already in here; you've [894] already offered them.

Mr. La Shelle: No.

The Witness: They're in in part.

Mr. La Shelle: They might probably be—ninety percent of them here, but the ones that were used up that were taken out of the warehouse, of course, aren't here. They're not pertinent, but I suppose most of them are, but not all of them, because some of that stuff was withdrawn and used and I suppose where they had it in the warehouse, there wasn't any particular system used as to what they withdrew first.

Mr. Fisk: Then that wouldn't be available to us.

Mr. La Shelle: The purpose of the audit is simply to show and to calculate under the terms of the contract the cost-plus basis and whether there was a credit or a debit due, and that was done.

(Testimony of Earl Johnson.)

The Referee: Are there any documents in this matter in the possession of Schenley that wouldn't be available to the respondents?

Mr. La Shelle: No, they could—naturally, everything that Hedgeside has, the trustee has.

The Referee: No, but I'm talking about in the possession of Schenley.

Mr. La Shelle: I don't quite get your question there.

The Referee: Well, Schenley must have some original [895] documents that the respondents here don't have access to, do they not?

Mr. La Shelle: You mean, invoices that aren't in this group?

The Referee: Including invoices. Do you, Mr. Johnson?

The Witness: I think I can see what you're pointing at. If I might explain that a little bit, I think it can bring this out. We'll say that for example now, we had purchased 10,000 barrels of merchandise from Hedgeside under the Hedgeside contract, at the present time, of those 10,000 barrels, we'll say that 4,000 barrels are now in IRBW No. 2. In support of those 4,000 barrels which are in question, all documents in support of those 4,000 barrels have been presented and are in evidence. However, the other 6,000 barrels, sometime before last June, that merchandise had been consumed, withdrawn or transferred from IRBW No. 2, or whatever warehouse it was in at the time that the net by Schenley was found, that was transferred out and were con-

(Testimony of Earl Johnson.)

sumed or is now in storage in other warehouses and is not in question in this suit, so that the supporting documents showing partial payment for that additional 6,000 barrels would not be in evidence in the court or would not be available. [896]

Mr. Fisk: Q. But in order to verify your audit, you would have to be able to——

Mr. La Shelle: No.

A. At the time——

The Referee: Wait a minute.

Q. Isn't that true?

Mr. La Shelle: No, your Honor, because that audit was made at Hedgeside. First, they determined the cost of grain under the contract. That was done entirely out of Hedgeside books, not ours; that was done entirely on Hedgeside's books, plus the 1598 and the 1520 forms. Now, if anyone has any question as far as the bank or the trustee is concerned, as to the correctness of this audit, they can take this audit and go to Hedgeside and verify or dispute that audit right out of Hedgeside because Hedgeside's invoices will show what the partial payments should have been. Now, if we didn't balance with their invoices, they could show it out of Hedgeside's books as soon as an accountant can go through them. That's all that can be done without reference to Schenley's books at all.

Mr. Fisk: Well, your Honor, I would like to have the Court ask Mr. Johnson that question.

The Referee: You can ask it.

Q. Mr. Johnson, in order to verify your audits,

(Testimony of Earl Johnson.)

taking your example of the 6,000 barrels, would you not have to examine [897] those documents that supported the 6,000 barrels?

A. At the time when our summary, I believe it's—May I refer to this?

The Referee: Surely.

A. (Continuing): At the time that the invoices were being processed through payment which was received from either Hedgeside or Franciscan covering the amounts of payment shown on Schedule A and the number of proof gallons, etc. which were shown on Schedule 1-b, those documents, the invoices and the support for those payments were processed through my department and that information was built up from those invoices. Then at the time of audit, that information was checked to the files of Hedgeside or Franciscan, as the case might be; they had duplicates of those particular invoices and that showed identical information with that. Does that answer your question?

Q. No.

A. At the time of audit, yes, we had. I mean, that would be the answer.

Q. The answer is yes.

A. At the time of audit, those documents were available to us.

Q. That's right. And all of those documents upon which your audit is based here are now in the possession of Schenley, isn't that true, regardless of who else might have possession of all of those, or in the possession of Schenley? [898]

(Testimony of Earl Johnson.)

A. Not all of the documents. The documents which cover—the government forms, the Hedgeside——

Q. I am not talking about all of the documents. I am talking about the 6,000 that were necessary to examine in order to verify your audit.

A. The documents in support of partial payments made, yes.

Mr. La Shelle: If I might——

Mr. Fisk: Wait just a minute. Just let me finish this. If your Honor please, let me illustrate one of the vices of what Schenley is endeavoring here. On Schedule 1-a of group attached to check 09514 and I think this follows the same scheme throughout in the schedules, which has to do with Hedgeside, that is a detail of grain purchases of Hedgeside for the month of December '47. In the second column from the left, it shows vendors and it lists the vendors. Nowhere in that document does it show who the vendee under those invoices that were examined there, was. Now, when we go to the Franciscan documents, the same thing is true. As a matter of fact, there was an awful lot of juggling around between Franciscan and Hedgeside as to grain. In other words, Hedgeside would be purchasing the grain and turning it over to Franciscan, and then there may have been some subsequent juggling around with the books. Now, with these documents going in here this way, it doesn't show the true fact. [899]

The Referee: Mr. Fisk, with reference to 1-a, I don't know what the fact is, but as far as the ex-

(Testimony of Earl Johnson.)

hibit is concerned, it would appear that the vendee in all cases was Hedgeside Distillery.

Mr. La Shelle: Yes.

The Referee: It says it at the top.

Mr. Fisk: Well, it says that.

The Referee: Well, I say, I don't know what the fact is.

Mr. Fisk: The original documents won't support it and the same thing with Franciscan. Now, they all were purchased by Hedgeside, but most of Franciscan's grain was purchased by Hedgeside too.

Mr. La Shelle: Your Honor, I think I have what may be a fairly simple solution of this case. Let us just assume for a moment that neither Frank nor Mr. Fisk are satisfied that this audit is correct. What, in the normal course, would they do? They would take the contract, together with the terms of the cost-plus, they would make their own check on the audit, go through the 1598 forms, the 1520 forms and go through these invoices here, you see, then they would take——

Mr. Fisk: Of Franciscan too?

Mr. La Shelle: Yes.

Mr. Fisk: Have we got free access to Franciscan?

Mr. La Shelle: Why certainly you have. [900]

Mr. Walsh: Oh, now, Mr. La Shelle.

Mr. La Shelle: You certainly have; you can subpoena their books in a minute.

Mr. Walsh: That's just what you can do. That's just exactly it.

Mr. La Shelle: We're confessing they've got

(Testimony of Earl Johnson.)

every right in the world to come in and show evidence against us and which I warrant they will never do, but be that as it may, if they were checking for their own satisfaction to find whether this audit was right, they first take the thing to calculate the cost of what they should be paid, don't you see, and they take the 1598's and 1520's and these invoices on the grain. From those alone, they can calculate from the contract what the entire payment should have been. Then they would go to see the partial payment and they would total up the invoices that were paid partially. Now, they are not going to accept Schenley's invoices on that. They're going to look at Hedgeside's invoices and if Hedgeside's invoices show that a Thousand Dollars less was paid, then their invoices show they're going to come in here and yell to High Heaven: "You owe us another Thousand Dollars"! They're going to go in Hedgeside's invoices, not ours. Now, if Hedgeside's invoices, on an example, don't tally with Schenley's invoices, then they go to check with us maybe and if they do, they could have [901] them. But they're going to go on Hedgeside's records, not ours, because we're the enemy. They're going to accept their's and they're going to contend that whatever that are, are right.

Mr. Walsh: If your audits go in, will you stipulate we can counteract the audit?

Mr. La Shelle: You can make an audit any time you want.

Mr. Walsh: No, but will you submit that *are*

(Testimony of Earl Johnson.)

counter-audit may go in in evidence as audit in this proceedings opposed to your audit?

Mr. La Shelle: No, because it's not made in the regular course of business. But as far as that is concerned, there never will be any audit made. But here is the thing. They have every right to go in and they can do it from Hedgeside's books alone and check this audit if they want to. Here is a situation where, Mr. Walsh, it applies particularly to Hedgeside, as attorney for the trustee he has access to everything, is he prepared at this time to make an offer of proof or even a statement based on any tangible evidence that he has good reason to believe that this audit is not correct? He can't do that. He has nothing in their books to show it. They cashed these checks; they took the amount of the audit. Now, there is your prima facie showing. Now, if there is anything wrong [902] with them, they can prove it. Otherwise, there's no such thing. Here is an audit that was made at the time and acted upon between the two parties; they took the checks and they were cashed in the amount where there was anything due. Forget the overpayment. We're out that much money as far as this case is concerned.

Mr. Walsh: Your Honor please, I submit that where the audit is based upon certain records which are available, not in the possession of Schenley and not part of their records, the Business Records Rule does not apply. It's no different, if your Honor please, than if Mr. La Shelle would separate from this so-called audit this statement regarding the

(Testimony of Earl Johnson.)

amount of grain used in the production of the distilled spirits. Now, if he attempted to introduce that in evidence, he would be met with the objection that is not the best evidence, produce the original. Now, the originals are available and he can subpoena them. He states to us, if your Honor please, states to the bank and to the trustee, that those records are available to us and we can examine them. That is the vice of the whole situation. He is trying to introduce in evidence, secondary evidence on the theory that it is part of their records. These documents are not part of the records of Schenley; they are part of the records of the Hedgeside Distillery and the Franciscan Farms and when the petitioner attempts to [903] introduce in evidence any of those records, he must produce the originals and not try to introduce indirectly, secondary evidence on the theory that the Business Records Rule—

Mr. Fisk: This is hearsay upon hearsay. It's an auditor's examination of a government agent's records of certain transactions that presumably took place with respect to Hedgeside and Franciscan.

Mr. Walsh: Your Honor please, Mr. Fisk hit the nail on the head when he stated that in some of these exhibits, the check was paid before the audit was even prepared. And how can you possibly introduce in evidence under the Business Records Rule, a compilation of documents which were not even in the possession of the petitioner, when the audit was made and the check was already paid in cash—was

(Testimony of Earl Johnson.)

already issued and cashed by the Hedgeside Distillery?

Mr. Ward: Your Honor, may I comment upon what Mr. Walsh has said about the best evidence rule under the Business Records Act? It seems to me that the act was probably designed to cover the best evidence rule in the case of the business records where the business record itself is an original business record and these, we submit, are offered and are original business records. Now, if there are other documents backing them up, under the Business Records, provided they themselves are original records [904] standing on their own two feet. Now, the same thing which Mr. Walsh has said, of course, is perfectly true when applied to any ledger of any kind, because a ledger, not being an original book of entry, you would have to go back to the journal and from the journal to the bills and the invoices, but that does not mean that a ledger is kept out of evidence because of the best evidence rule. The best evidence rule simply does not apply if the business record you submit is itself an original record.

Mr. Fisk: Here is a perfect example of what counsel is talking about. During the war, a lot of corporations, particularly large contractors, knowing that there is always a lot of difficulty arising after a war on the various contracts, a lot of them had auditors, accountants in their organizations and monthly making an audit of all of their records to support any controversy that might come up in the future with the government with respect to what

(Testimony of Earl Johnson.)

they did. Now, I submit that they couldn't possibly introduce that in evidence at a subsequent controversy that arose between the government and that contractor simply because they said "we had an auditor do it currently as we went along." They weren't recordings of acts, events, transactions, or occurrences. It's purely and simply a self-serving document. [905]

Mr. La Shelle: If the Court please, these are admittedly secondary evidence under the Business Records act. They're not conclusive. They can be disputed. As the Business Records Act itself says, the objections go to their weight, and not as to admissibility.

Mr. Fisk: What kind of evidence can't be disputed? What has that got to do with it?

Mr. La Shelle: If you don't think that audit is correct, you can go right to Hedgeside and Franciscan and check it or if it isn't correct, say we put in two phony invoices, and everything. I'm satisfied, your Honor. I am perfectly willing to submit the evidence in the revised offer.

The Referee: Submitted? The revised offer, objection is overruled; 54, becomes 54 in evidence, subject to the correction and statement of Mr. La Shelle.

Mr. La Shelle: It's a little after twelve, your Honor.

The Referee: Very well.

Mr. Walsh: Now, for the purpose of the record, what is this——

(Testimony of Earl Johnson.)

Mr. La Shelle: I have already made it.

Mr. Walsh: I would like to have it again.

Mr. La Shelle: Now, read it. I am not going to make it twice.

Mr. Walsh: If your Honor please—— [906]

The Referee: Just a minute, Mr. Walsh, I'll come to your assistance.

Mr. La Shelle: I just don't like to say the same thing twice because I'm afraid I'll say it differently.

(Discussion off the record.)

The Referee: In the group starting with the check No. 08549, in that group the check is not in, the voucher is not in, the bill correction memorandum is not in; Invoice No. 10504 is not in.

Mr. Walsh: What's that one?

The Referee: That's an invoice that is in the same group. It's the invoice that is not in. Now, those documents in that set I gave you are not admitted.

Mr. La Shelle: They are considered marked for identification.

The Referee: Now, in the check No. 10930, the check is not in and the voucher is not in and the bill correction memorandum is not in, and in check No. 14599 the check is not in, the voucher is not in, the bill correction memorandum is not in, and the six invoices are not in, which means that the sheets with checks No., and accompanying documents, 12181, 07108, 09584, and 13520, those are incomplete. Two o'clock, gentlemen?

Mr. Walsh: Now, I heard Mr. La Shelle state

(Testimony of Earl Johnson.)

for the first time that he wanted the other documents not admitted in evidence, still to remain for identification. [907] Now, what number are you going to call those?

The Referee: Well, I would have no objection if counsel has no objection, if we just took them off this set. You have no objection to that; then they're out of here completely.

Mr. La Shelle: It's all right with me.

Mr. Walsh: He made the statement he still wanted them in identification.

Mr. La Shelle: No, I don't want them in. I just said they could be used for identification.

Mr. Walsh: That's just the reason I wanted to go over this matter and clear it up. Now, do you want them for identification or not?

Mr. La Shelle: I said they could be considered for identification. If you don't want it in and the Court's agreeable, I'll take them out right now.

The Referee: What would you gentlemen prefer? The documents have been marked.

Mr. Walsh: I think they should go out so the record will be clear.

The Referee: I just thought maybe later on when this matter reaches some higher tribunal, when these are marked for identification, you could say—

Mr. Fisk: Leave them in.

Mr. Walsh: What number are you going to give them?

Mr. La Shelle: If they're marked for identification, [908] they can't hurt.

(Testimony of Earl Johnson.)

The Referee: I'll mark them 54-a for Identification.

* * * * * [909]

Afternoon Session—2:00 o'clock p.m.

The Referee: Well, Mr. Johnson, I think that Mr. La Shelle has a couple of questions. Do you, Mr. La Shelle?

Mr. La Shelle: Yes.

The Referee: Mr. Walsh, you were the last one that was asking Mr. Johnson a question.

Mr. Walsh: Yes.

The Referee: Are you finished temporarily?

Mr. Walsh: Yes.

Mr. La Shelle: May the record show that your cross-examination is not lost in the storm?

(Discussion off the record.)

Redirect Examination

Mr. La Shelle: Q. Mr. Johnson, before we recessed at noon, I believe you testified that when you went up there, (I think it was on the physical inventory) from the government records and barrels themselves, you couldn't tell who the spirits belonged to, is that right?

A. No, I couldn't. [1129]

Q. And from the government records or the barrels, can you ever tell who the merchandise belongs to?

Mr. Walsh: Just a minute, your Honor please, I am going to object to that as not proper redirect.

(Testimony of Earl Johnson.)

Mr. Fisk: It is irrelevant, incompetent and immaterial.

The Referee: Sustained.

Mr. La Shelle: Your Honor, if I may be heard on that, the question was whether they could tell from the government records or the barrels themselves whether any of this whiskey belonged to Schenley and he said no, and that's quite true, the implication perhaps being that we forgot to mark them. I am developing that in no instance would the government records or barrels show ownership. There is not even any provision on the government form for it. They're not interested in it.

Mr. Fisk: I don't think this witness can answer that question.

Mr. La Shelle: I think he can.

Mr. Fisk: Whether you can ever tell.

Mr. Walsh: If your Honor please, my question was confined exclusively to the situation at the Hedgeside Distillery. And it only deals with the particular whiskey and distilled spirits now stored at the Hedgeside warehouse and it's improper re-direct.

The Referee: I sustain the objection, but the Court [1130] is not going to decide on the answer that he gave prior.

Mr. La Shelle: I understand that.

Q. Well, have you got a group of 1598 or 1520 forms with you?

A. I turned over a set of each or a couple of sets of each to you this morning.

(Testimony of Earl Johnson.)

Mr. La Shelle: Oh, you did?

(Discussion off the record.)

Q. I think you testified with reference to the audits, that the government forms which you used in making those audits were the 1598's and the 1520's, is that right? A. That's correct.

Q. And those two printed forms that you just gave the Judge—1598 in three parts and 1520 in one part, one long form and one short form, are those the forms that you worked from?

A. Yes.

Q. In making the audits? A. Yes.

Mr. La Shelle: We offer those in evidence, your Honor, as an example of the forms so the Court may have some idea of what was worked from and also for the purpose of showing from the exhibits themselves that there is no provision on any of these government forms in question as to ownership of the spirits.

Mr. Walsh: Now, your Honor please, I am going to object to offering in evidence on behalf of the petitioner, those documents which are Form 1520 and 1598. [1131] Mr. La Shelle states that the purpose of introducing these documents in evidence is to show that none of these forms which were kept by the government gauger at Hedgeside Distillery contained any statements or entries showing the ownership of the distilled spirits or whiskey. Now, I submit the best evidence is the records kept by the government at Hedgeside.

Mr. La Shelle: I may have misled him with

(Testimony of Earl Johnson.)

what I said, although I didn't intend to. I meant to show that these two forms here do not show any ownership. And also to illustrate the forms that he worked from in making the audits.

Mr. Fisk: I have no objection—I make the same objection as Mr. Walsh, on behalf of the bank, but I have no objection to his offering these. The testimony of the witness said these are the printed forms that he examined as far as the printed form itself is concerned, but I don't think it is the proper way to show what was filled in on the forms or what was not filled in on the forms.

The Referee: 1520 has already been marked for identification as the Bank's No. 1.

Mr. Fisk: That's right.

The Referee: The 1598 form in three parts, will now be marked as Petitioner's No. 58 for Identification. Mr. Johnson or Mr. Fisk, do you recall whether the 1520 [1132] that is marked for identification now in the possession of Mr. Fisk, is the short form——

The Witness: It is the long form.

Mr. Fisk: It is the long form.

The Witness: Yes.

(Discussion off the record.)

The Referee: You may proceed, Mr. La Shelle.

Mr. La Shelle: With reference to Petitioner's Exhibit No. 15 for Identification, which is the 1598, we offer that in evidence, your Honor.

The Referee: Objection sustained.

Mr. La Shelle: Well, I'm not limiting it. The

(Testimony of Earl Johnson.)

purpose of it is to show what that government form is. Now, the witness has testified that he utilized that form in making the audits. The form speaks for itself. There is no question as to the authenticity of the form, I take it.

The Referee: Except that this is the blank form here.

Mr. La Shelle: Yes, but it is to show what provisions there are to make. And then for what it's worth, you can illustrate there, your Honor, that there is no provision on this form, at least for me, showing as to who owns the spirits.

The Referee: Well, in that respect, both you gentlemen, all three of you, are arguing the same way.

Mr. La Shelle: Yes, but there's nothing before the [1133] Court—nothing to show before the Court.

The Referee: I mean, you agree to that.

Mr. Walsh: Surely.

Mr. Fisk: My objection is this: My objection is simply that this form is not relevant evidence in this proceeding of anything except that it is a 1598 blank form of the government.

Mr. La Shelle: Perhaps I misunderstood.

Mr. Fisk: I don't think that's relevant.

Mr. La Shelle: Well, perhaps I misunderstood you gentlemen, but are you willing to stipulate that Form 1598 and 1520 has no provision for showing ownership of the goods as to who that was sold to?

Mr. Fisk: No, I don't see any occasion to—

Mr. La Shelle: That's just it. They agree to it

(Testimony of Earl Johnson.)

informally but when you ask for a stipulation they won't agree to it. I think that is perfectly competent to show one thing—that there is no provision in these forms for the showing of any ownership other than who produced them. They testified, oh, contents from those government records, who owns them, they testified from the barrels. No, then they'll argue later on, by implication we failed to do something to earmark these goods when there is no method of earmarking them.

The Referee: Mr. Walsh is in accord with a portion of your statement, Mr. La Shelle—the part that maintains [1134] there is no ownership bracket in this form.

Mr. La Shelle: Yes, but when you ask them to stipulate, they refuse to do so. Then we should be allowed to show that by the form.

The Referee: Well, you can have this witness testify and refer to these forms that have been marked for identification; you may do that.

Mr. La Shelle: I should think the best evidence would be the form, not the witness's testimony. All they do is read them and say it isn't there. We can do it that way.

Mr. Walsh: Mr. La Shelle, as the Court states, we are all in accord with the fact that from an examination of Form 1520 and Form 1598 now in the custody of the gauger at the Hedgeside Distillery, no one could tell the ownership of the distilled spirits and whiskey now on storage at the Hedgeside Distillery Warehouse. Now, to try to introduce in

(Testimony of Earl Johnson.)

evidence a blank form with the comment that you can read my mind and tell me what purpose I am going to use that form in the future, I submit is clearly incompetent.

Q. Well, Mr. Johnson, is there any provision on 1598 or 1520 in the way you used them in the audits in which you can determine ownership of the goods?

A. No.

Q. Is there any method that you know of from your experience of being in warehouses or making audits of any kind in which the [1135] barrels are earmarked as to who owns them?

Mr. Walsh: Just a minute, if your Honor please, I am going to object to that question on the grounds it is improper redirect, on the second ground it's incompetent, irrelevant and immaterial in this proceeding. I confined my cross-examination exclusively to what took place at the Hedgeside Distillery and what the present situation is at Hedgeside Distillery.

Mr. Fisk: I should like to make an objection it is irrelevant, incompetent and immaterial whether it is possible to follow a method to identify barrels.

The Referee: Sustained.

Q. Well, I might ask you this. To your knowledge, is it the custom or practice to earmark or mark barrels or spirits in bond in any manner so as to designate the owner?

Mr. Walsh: Now, just a minute, your Honor, I object to that, your Honor. It's improper redirect, it's incompetent, irrelevant and immaterial.

(Testimony of Earl Johnson.)

Mr. Fisk: No foundation laid for it.

The Referee: Sustained.

Mr. La Shelle: Your Honor, the witness has developed on cross-examination that there was nothing on the barrels.

The Referee: The witness didn't state that. The witness stated that there were serial numbers and other numbers on the barrels. His answer to Mr. Walsh's question [1136] was that there was nothing on the barrels that indicated that it belonged to Schenley or there was nothing on there which showed ownership to anyone. His answer to me was that there were serial numbers on there, is that correct?

The Witness: That's correct.

Q. Now, with reference to the other barrels that you saw up there that you testified to, was there any evidence on those barrels as to who owned them?

A. No.

Q. I think you stated that there was somewhat over 9,000 barrels there and somewhat under nine were Schenley's. A. That's correct.

Q. Now, when you went up there on the inventory, I think you told Mr. Walsh you couldn't tell from the government records or from the barrels what was Schenley's and what wasn't Schenley's.

A. That's right.

Q. Were there any other records from which you could tell which was Schenley's and which wasn't?

A. Only from the proprietorship records.

Q. And by "only from the proprietorship rec-

(Testimony of Earl Johnson.)

ords," you mean records as distinguished from the government records? A. That's correct.

Q. And what were those proprietorship records?

A. Warehouse receipts would be the record which I have particular reference to, the copies of the warehouse receipts maintained in the proprietor's books on the premises up there. [1137]

Q. You mean like these books that were in here.

A. That's correct.

Q. Warehouse receipt books.

Mr. Fisk: May I have the last question and answer read?

(The last four questions and answers were read by the Reporter.)

Q. By these books, I mean the warehouse receipt books that are marked in here. I think that's all, your Honor.

The Referee: Mr. Fisk?

Recross-Examination

Mr. Fisk: Q. In other words, your method of determining Schenley's claim of ownership was from an examination of the proprietary records at Hedge-side, is that your testimony?

Mr. La Shelle: Just a moment, I object to that. That is not proper cross-examination as to the basis for Schenley's claim.

Mr. Fisk: That's the only relevancy of his testimony.

Mr. La Shelle: That is the matter upon which the Judge is going to be called upon to decide here.

(Testimony of Earl Johnson.)

The Referee: Just before Mr. La Shelle finished, read the question that Mr. La Shelle asked the witness with reference to the proprietorship records and Mr. Fisk's question.

(The questions and answers referred to were read by the Reporter.) [1138]

The Referee: Overruled. You may answer.

A. Since before we went up there, Schenley's claim was from the copies of the original warehouse receipts which we had available to us for the approximately 9,000 barrels of merchandise stored up in IRBW No. 2 at Napa, California. However, in order to know who was supposed to be the owner of any of that merchandise at any time, whether it be Schenley or otherwise, the records are available in the proprietor's copies of the warehouse receipt books indicating who was supposed to have ownership of the merchandise stored up in IRBW No. 2.

Q. And your means of determining whom you thought had ownership to those barrels was from an examination of the warehouse receipt books of Hedgeside, is that correct?

A. That is correct.

Mr. La Shelle: That's all.

Recross-Examination

Mr. Walsh: Q. In other words, Mr. Johnson, if a stranger went up to the premises of the Hedgeside Distillery to ascertain who owned the whiskey and distilled spirits stored in the Hedgeside warehouse,

(Testimony of Earl Johnson.)

he could only get that information from the proprietor's records, is that correct?

A. That's correct.

Mr. Fisk: Q. And in particular, the warehouse receipt books.

A. That's what we used was the warehouse receipt books in particular, but there were sales records and other records up there covering the purchase and sale of merchandise, copies of [1139] invoices and so forth which we had available.

Q. But you, in establishing Schenley's position, you looked at the warehouse receipt books, is that right?

A. We checked the warehouse receipt books to see that they were in conformity with the copies of the original warehouse receipts which we already had on hand.

Mr. Fisk: That's all.

Mr. Walsh: No further questions, your Honor.

The Referee: Mr. La Shelle.

Mr. La Shelle: Q. They were verified to show whether your records checked with theirs.

A. That's correct.

Mr. La Shelle: Miss Jones, please.

ELOUISE JONES

called as a witness on behalf of the Petitioner, being first duly sworn by the Referee, testified as follows:

The Referee: Q. Your full name?

A. Elouise Jones.

Q. Elouise? A. Yes.

(Testimony of Elouise Jones.)

Q. E-l-o-i-s-e? A. E-l-o-u-i-s-e.

Q. And where do you reside?

A. San Francisco.

Q. Street address? A. 950 Bay.

The Referee: Very well, Mr. La Shelle.

Direct Examination

Mr. La Shelle: Q. Miss Jones, you are employed by Schenley's, are you not? [1140]

A. Yes, sir.

Q. And have been for quite some years?

A. Yes.

Q. How long? A. Six years.

Q. And during the years 1947 and 1948, were you employed by Schenley's in San Francisco?

A. Yes, sir.

Q. And in what department were you employed?

A. In the cashier, contract and lease department.

Q. And in what capacity; did you have any particular title?

A. Well, I was assistant to the man that had supervision over those three departments.

Q. And during the—starting some time in the fall of 1947 and during the so-called winter of '47 and '8 and spring of '48, did you do anything in connection with the Franciscan and Hedgeside spirits contracts? A. Yes.

Q. And will you just tell the Court what you did with reference to that contract and what your duties were?

A. I personally would pick up the invoices and warehouse receipts from the bank and—

(Testimony of Elouise Jones.)

Q. What bank?

A. The Anglo California Bank. We would put them through for payment and then I personally would take the money and the—take the money to the bank and pick up the warehouse receipt, the paid sight draft and the original invoice.

Q. Now, getting a little bit more specific, with reference to those functions that you described generally, I would like to [1141] have you take it out of the various steps, starting with the first step. What would be the first thing that you would do?

A. Some man (I don't know what his name was) from the Anglo California Bank would call me, and say that he had a specified number of warehouse receipts and invoices from Hedgeside there on sight draft that should be picked up for payment. I would immediately go to the bank and check the invoice against the typewritten part of the warehouse receipt.

Q. Now, explain to the Judge just what you mean by that.

A. The warehouse receipt is in a printed form and inserted or typewritten on the form were serial numbers, the OPG's, original proof gallons, and it showed the location of the warehouse and it was signed by someone at the warehouse stating that the gallonage was at the warehouse.

Q. Now, you say you check that against the invoice? A. Yes.

Q. Did the bank give you an extra copy of the invoice? A. They gave me a duplicate copy.

(Testimony of Elouise Jones.)

Q. And then you would, in effect, as I understand it, proofread the invoice against the typewritten portions.

A. That's right.

Q. Of the warehouse receipt.

A. The body of the warehouse receipt and the invoice were the same—should be the same.

Q. And then when you had done that and were satisfied that the two tallied, then what was your next step? [1142]

A. Well, also, I checked to see that it was approved by our representative at the Hedgeside. Then I brought the duplicate invoice—

Q. Do you recall the name of that representative?

A. Mr. Del Tredici. If his okay was on there, I would bring the duplicate invoice back to the office, make up a request for check and send that to the production department. When they had approved it for payment, then the voucher check was sent back to me or to my superior, Mr. Manheim, either one of us would proofread that again to see that the amount and extension and so forth were right. Then it would be signed by either one of us and I would take it back to the bank, pick up the original receipt or original invoice, rather, and the warehouse receipt and bring them back to the office where I kept them.

Q. And with reference to that transaction, when you picked up the original invoices and the warehouse receipt itself, were there drafts in connection with that?

(Testimony of Elouise Jones.)

A. Yes, both of the invoices and the sight draft were marked paid.

Q. And then you would bring those back to your office? A. Yes.

Q. And with reference to the invoices during this period of time, were they all Hedgeside invoices or were there some other invoices?

A. Well, I couldn't say for sure. There were both of them. [1143] We had Franciscan and Hedgeside.

Q. Just how many there were of one or how many of the other—— A. I don't know.

Q. (Continuing): You do not know——

A. I didn't keep track of it or an account of them.

* * * * * [1144]

CHARLES W. EBNOTHER

called as a witness on behalf of the Petitioner, having been previously sworn, testified as follows:

The Referee: You have been sworn before, Mr. Ebnoter?

Mr. Walsh: Yes, he has been on the stand.

The Referee: Mr. La Shelle, do you have any progress to report with reference to the attempt to contact alleged sight drafts that may or may not be in the New York office?

Mr. La Shelle: I can report progress, by God! They have been found and they're mixed up with some other stuff. They were found in the production department. I think Miss Jones found them last

(Testimony of Charles W. Ebnother.)

night and I asked them to take the other stuff out that had nothing to do with it. Put them in order so that they would correspond to the schedule so that you could go down the line, but that hasn't been done. There's quite a few of them.

(Discussion off the record.)

The Referee: This is for the record. Mr. La Shelle, you were going to furnish the Court with exhibits 56 and 57 for Identification which are copies of transmittal letters to Hedgeside and Franciscan. [1178]

(Discussion off the record.)

The Referee: Petitioner's Exhibit 56 for Identification, transmittal letters to Hedgeside, and I am keeping the same date—March 27. Now, the Franciscan letters—

Mr. La Shelle: Now, Franciscan—Schenley to Franciscan, December 19, 1947; the next one is April 23 Schenley to Franciscan; the next is March 19, Schenley to Franciscan, '48; the next is February 18, '48, Schenley to Franciscan; the next is January 16, '48 to Franciscan.

The Referee: That's Petitioner's Exhibit 57 for Identification—March 27.

(Discussion off the record.)

Mr. La Shelle: I think it has already been developed for the record that Mr. Ebnother here is the duly appointed and acting trustee in this case. And may it please the Court, I had intended producing the minute book and I think also explained to the Court what happened this morning. What I

(Testimony of Charles W. Ebnother.)

wanted to develop from that minute book was that at Napa, where the Hedgeside warehouse is in question, was the principal place of business of the bankrupt corporation at the times in question in this case and that R. I. Stone was the president of the corporation at the time in question in this case.

Mr. Fisk: At the time of what?

Mr. La Shelle: At the time in question in this case. In other words, that would be roughly during the years of '48 and '49, and also that Mr. McMains, whose first name or initial slipped my memory—Do you recall him?

The Witness: W. S.—Warren S.

Mr. La Shelle: Warren S. McMains or W. S. McMains was an officer of the bankrupt corporation during that period, I think secretary, is that right?

The Witness: Possibly secretary-treasurer. He might have been secretary. Yes, he was secretary.

Mr. La Shelle: And also, that I think Mr. Logan—I don't remember his first name?

The Witness: David F., I believe.

Mr. La Shelle: And he was a vice-president or an officer, was he not?

The Witness: Yes, vice-president.

Mr. La Shelle: And those are the principal matters that I wish to establish in the minute book and that due to that little snag here that I mentioned to your Honor, it isn't here. May that be stipulated to, gentlemen?

Mr. Fisk: We will stipulate to it subject to check and I take it when you say that the principal

(Testimony of Charles W. Ebnother.)

place of business of Hedgeside was at Napa, you have reference [1180] to the fact that the articles show that to be the principal place of business—Napa.

Mr. La Shelle: And also, in the minutes would be evidence of a resolution establishing if they change it, don't you see?

Mr. Fisk: Well, I am perfectly willing to stipulate, subject to check, that the articles of association show Napa to be the principal place of business.

Mr. La Shelle: Well, of course, I don't know what the minute book shows. I have never seen it. There may be some resolution in there in question. I take it that at the next hearing at least, you can produce the minute book, couldn't you?

Mr. Fisk: Certainly; certainly. The only thing I was getting at, Mr. La Shelle, was this. That we aren't stipulating to any fact except that that's what the articles show.

Mr. La Shelle: Well, I mean——

Mr. Fisk: If you want to establish where they did business, it seems to me you don't do that through the articles; you do it through a witness and what they did.

Mr. La Shelle: Well, I am not asking for anything beyond the minute book and we can have it here tomorrow and in order not to bring Mr. Ebnother back if we can possibly avoid it, can we use the minute book by stipulation? [1181]

Mr. Fisk: Surely. Now, it is my recollection (it will have to be, of course, subject to check upon

(Testimony of Charles W. Ebnother.)

producing the book) that Mr. Stone, throughout the entire period from 1945 was president, David Logan was vice-president. I don't know about McMains except that I know that he signed such papers as secretary. Now, it's also my recollection that Mr. Axelrod was the secretary part of the period.

The Referee: There is some document here that indicates at some period Mr. Axelrod was assistant secretary, I believe. Was he?

Mr. Fisk: I am perfectly willing that you use the documents that the minutes show, whatever they show.

Mr. La Shelle: Yes, you can bring it in tomorrow.

Mr. Fisk: Yes.

The Referee: Mr. Walsh, isn't there some document with reference to the administration of the estate, not with reference to the petition of Schenley, that indicates that Axelrod held some title?

Mr. Walsh: Yes, that information is in evidence under 21(a) in the transcript.

The Referee: Well, in any event—I am sure that Axelrod held some title.

Mr. Fisk: Well, he signed some of these contracts.

The Referee: And he also, as I recall it, signed some of these bankruptcy documents when I instructed the [1182] trustee, Mr. Ebnother, to assist the Court in preparation of his schedules.

Mr. Walsh: They signed minutes, prepared the—

The Referee: Statement of affairs.

(Testimony of Charles W. Ebnother.)

Mr. Walsh: (Continuing): statement of affairs, your Honor. I think you will find those are signed by Axelrod.

The Referee: Stone signed those.

Mr. La Shelle: Stone signed those.

Mr. Walsh: Did he?

The Referee: As president. Here is what this document says. This doesn't have to be in now.

(Discussion off the record.)

The Referee: But in any event, you will have the minute book, Mr. Walsh or Mr. Fisk, available?

Mr. Walsh: Yes, your Honor.

The Referee: All right, Mr. La Shelle.

Mr. La Shelle: Well, I think for the time being, we can pass on to another matter, your Honor.

Direct Examination

Mr. La Shelle: Q. Mr. Ebnother, I'll show you here one, two, three, four, five, six, seven warehouse receipt books purporting to have fifty receipts to a book, beginning with number 3351 down to and including 3700. These purport to be the copies of warehouse receipts of Hedgeside Distilleries. You have seen these books before, have you not?

A. Yes, sir. [1183]

Q. And where did you get these books?

Mr. Fisk: Just a minute, do they purport to be of the Hedgeside Distillery or Internal Revenue Bonded Warehouse No. 2?

Mr. La Shelle: Well, I mean, they have that item described in great detail—Hedgeside Distillery, In-

(Testimony of Charles W. Ebnother.)

ternational Revenue Bonded Warehouse No. 2. It says "received in our Internal Revenue Bonded Warehouse No. 2 to the account of, subject to your," etc. I didn't go through the whole rigamarole in describing it. I think the question was: Where did you get these seven warehouse receipt books I just mentioned? A. Out of the vault at Hedgeside.

Q. And by "Hedgeside," you mean the Hedgeside—

A. Hedgeside Distillery Corporation.

Q. The company's plant at Napa, California?

A. Yes, sir.

Q. And when was it that you got those? That was following your appointment as trustee in this case, was it not? A. Early part of June.

Q. And shortly after you were appointed.

A. Yes, sir.

Q. And by the vault that you state, could you just tell us where that vault is located with reference to the office and the warehouse?

A. Well, it's adjacent, you might say, or a part of the [1184] office.

Q. In other words, it's—

A. In one corner of the room it was or off of the main used as an office.

Q. And with respect to the office, where is that located with reference to the warehouse?

A. Well, there are three large, basaltite rock buildings—Warehouse A, B and I believe, C. I've forgotten the number of the third one but it's the third building in from the gate.

(Testimony of Charles W. Ebnother.)

Q. In other words, Warehouse No. 2 is three different buildings, is that right

A. No, Warehouse No. 2 — Internal Bonded Warehouse No. 2 is two buildings.

Q. Is two buildings. A. Yes.

Q. And the office is in which one of those buildings? A. Neither.

Q. Which building is it in?

A. It's in a third building which also houses the vault.

Q. And where is that with reference to A and B?

A. Well, they're all in a row, ranging from the gate back as you drive in. The first two are warehouse buildings and the third one is the one in which the office is located.

Q. And there has been no change, to your knowledge, has there, in the contents of these books from the time that you picked them up?

A. No material change, no. [1185]

Mr. Walsh: Now, wait a minute. Did you understand his question, Mr. Ebnother?

The Referee: Will you read the question and Mr. Ebnother's answer?

(The last question and answer were read by the Reporter.)

Mr. Walsh: You don't mean "no material——". What do you mean by "material change"?

The Witness: What I have reference to is this: I believe that there were one or two copies which were picked out of the files and put in those books.

(Testimony of Charles W. Ebnother.)

They were in there the first day that we checked. That's what I had reference to.

(Discussion off the record.)

Q. Just to clear up that point, when you first got the books, you found some copies of something missing?

A. I believe there were a few—one or two copies that we found later in the files.

Q. And you put those in the books.

A. That's right.

Q. Where did you find the copies?

A. In the Hedgeside files.

Mr. La Shelle: Your Honor, these seven books have not yet even been marked, have they?

The Witness: They haven't.

Mr. La Shelle: These seven books, warehouse receipts that are now marked for identification as to [1186] their numbers, are covered by these seven books. We have checked that and therefore, offer these warehouse receipt books in evidence at this time as Petitioner's Exhibit next in order.

The Referee: Just a minute, Mr. La Shelle. Do I understand now that you are testifying or making a statement with reference to the exhibits—the photostatic copies——

Mr. La Shelle: Well, I am not testifying; I mean, it's a matter of check. I have checked and I mean, I am perfectly willing to let counsel check if they want to. Do you want to check those numbers from the statement——

(Testimony of Charles W. Ebnother.)

Mr. Walsh: Your Honor please, I am going to object to the introduction in evidence of these seven books at the present time for the following reasons: If you recall, at the prior hearings, an objection was sustained to the introduction in evidence of the original warehouse receipts until they were properly identified. Now, I submit that the same objection applies to these books which contain the carbon copies of these warehouse receipts. Mr. La Shelle is trying to get in evidence indirectly documents which he couldn't do directly.

Mr. Fisk: And I object to it on the ground that there is no proper foundation laid, it is irrelevant, [1187] incompetent and immaterial; until the original warehouse receipts that Schenley has claimed that there are are offered and received in evidence in this proceeding, these books have obviously no materiality whatsoever.

Mr. La Shelle: My purpose here is simply this, your Honor. The objection to the original warehouse receipts which were marked for identification, that naturally needed further qualification, which I will give in due course if I can't do it at the present time. Now, the introduction in evidence of these books standing alone, are not going to introduce in evidence the original warehouse receipts. That's obvious. But it's part of a chain of evidence going toward the establishment in due course of the original warehouse receipts and I

(Testimony of Charles W. Ebnother.)

think from that basis as part of a foundation, they are admissible for that purpose.

Mr. Fisk: You have the cart before the horse.

The Referee: You gentlemen agree with me, merely for the sake of numbers, that the last number we had was 57.

Mr. Walsh: Right.

The Referee: I mean, even though those two substituted documents came in today as 56 and 57 at the last hearing, did I receive anything later than a 57?

Mr. Walsh: I understand you did not.

Mr. La Shelle: Not to my knowledge. [1188]

The Referee: The seven warehouse receipt books will all be identified as Petitioner's Exhibit No. 58 as one exhibit. When the warehouse receipts are identified and are in evidence through the witness that you are still going to supply, then the Court will entertain your motion to introduce these seven books in evidence without the necessity of any further examination from Mr. Ebnother.

Mr. La Shelle: Have you fellows got a note of these numbers?

Mr. Fisk: No, we haven't. But before you pass on that, my notes here show, your Honor, that Petitioner's for Identification was government form 1598.

The Referee: That's what I was afraid of. I mean, I can check here but I think you are right, Mr. Fisk.

(Testimony of Charles W. Ebnother.)

Mr. La Shelle: That's right. So this will be 59.

The Referee: So this will be 59. Now, you can go ahead, Mr. La Shelle, and identify the books.

Mr. La Shelle: Yes, for the purpose of notation of respective counsel, there are seven books of non-negotiable and they start with 3351 and run down to and including 3700.

The Referee: Are they inclusive for the fifties right through?

Mr. La Shelle: Right through.

The Referee: There's no break between—— [1189]

Mr. La Shelle: Well, let me check again—3351 to 3400; 3401 to 3450; 3451 to 3500——

Mr. Fisk: It would have to go to 3800 to make seven.

Mr. La Shelle: 3501 to 3550; 3551 to 3600; 3601 to 3650; 3651 to 3700.

The Referee: Petitioner's No. 59 for Identification. The seven books will be one exhibit.

(Discussion off the record.)

Q. Mr. Ebnother, I show you here, Petitioner's Exhibits No. 46 and 47 for Identification which consists, in substance, of a general description of Form 27-d of the Treasury Department covering Internal Revenue Bonded Warehouse No. 2 at Napa, California. Now, these are photostats which have been substituted for the originals. You will recall, I think, sometime ago that at our request, you produced those two Petitioner's Exhibits No. 46 and 47?

(Testimony of Charles W. Ebnother.)

(Discussion off the record.)

A. Were these photostated at Napa or here?

Q. I don't know. All I know is that the originals were produced here and were turned over to Mr. Walsh in the courtroom for the purpose of getting them photostated. Now, who did that physically, I don't know.

A. I don't either.

(Discussion off the record.)

The Witness: What is your question on this again?

(The Reporter read as follows: "Question: Mr. Ebnother, [1190] I show you here, Petitioner's Exhibits No. 46 and 47 for Identification which consists, in substance, of a general description of Form 27-D of the Treasury Department covering Internal Revenue Bonded Warehouse No. 2 at Napa, California. Now, these are photostats which have been substituted for the originals. You will recall, I think, sometime ago that at our request, you produced those two Petitioner's Exhibits No. 46 and 47?")

A. I don't remember the numbers. I produced petitioner's exhibits, but I don't remember what the numbers were.

Q. Well, I mean, you produced these documents. You remember we were questioning you to bring the ATU forms and correspondence with reference to the warehouses?

A. I did.

Q. And those are what you brought in and were later photostated, is that correct?

(Testimony of Charles W. Ebnother.)

A. Well, I assume it is but I have to depend upon——

Mr. La Shelle: Well, I might state, your Honor, that the purpose of this is to offer proof that the warehouse in question up here is an Internal Revenue Bonded Warehouse. We have Mr. Walsh's stipulation to that effect which he gave just before the trial started but Mr. Fisk did not agree to the stipulation so the proof, as far as Mr. Fisk is concerned, has to go in. Mr. Walsh stipulated before the trial that—— [1191]

Mr. Walsh: How could I stipulate before the trial and it would not be in evidence? If it was before the trial, where would I stipulate?

Mr. La Shelle: I mean, I phoned you and asked you if you would stipulate and you said you would but Mr. Fisk said he wouldn't, isn't that correct?

Mr. Fisk: That never was put up to me, if I remember correctly.

Mr. La Shelle: It definitely was. You agreed to stipulate to it if I stipulated it had no legal significance in the case.

Mr. Fisk: Was that in this proceeding?

Mr. La Shelle: No, on the phone before the trial started, I asked you for that stipulation.

Mr. Fisk: Oh, before the trial started!

Mr. La Shelle: And Mr. Walsh said he would stipulate; there was no question in his mind. You said you would stipulate if I would stipulate it had no legal significance in the case, which I refused to do.

(Testimony of Charles W. Ebnother.)

Mr. Fisk: I just don't remember that when you say that.

The Referee: Well, regardless of the background, what is the situation now?

Mr. La Shelle: Well, these were produced by Mr. Ebnother, no one else, and they were taken in here for photostating. The originals, according to Mr. Walsh, [1192] were given back to Mr. Ebnother. In reviewing these photostats, apparently some confusion is in his mind on account of it being photostated as to whether they're what he produced.

Mr. Walsh: Well, Mr. La Shelle, if you will examine these documents, you will find that these were marked by the Court as Petitioner's 46 for Identification and 47 for Identification. Now, I recall exactly what happened. The originals were introduced in evidence—for identification as Petitioner's 46 and 47; then the originals were given to me to have photostated, which I did. Then the photostats were introduced in evidence for identification only——

Mr. La Shelle: Wait a minute, were they introduced in evidence?

Mr. Walsh: I mean, for identification. They were in for identification only. And the originals were turned over to Mr. Ebnother. No doubt he took them back to the distillery.

Mr. La Shelle: Yes, but that's quite correct. But in having them marked for identification, as dis-

(Testimony of Charles W. Ebnother.)

tinguished from going into evidence, no testimony at that time was given by Mr. Ebnother concerning them whatsoever.

Mr. Walsh: No.

Mr. La Shelle: Isn't that right? That's what I'm [1193] trying to develop.

Q. Now, as to whether or not Petitioner's Exhibits, photostatic copies now 46 and 47 for Schenley's, is that what you produced that time and what we had? I mean, if necessary, we'll have to get the originals again.

A. Well, it's my opinion that it is.

Q. All right. And where did you get those?

A. Out of the files of the Hedgeside Distillery Corporation.

Q. And that was after your appointment as trustee, I take it.

A. It was.

Q. And approximately when was that, do you recall? I mean, what month?

A. No, I do not. This must have been——

Q. During the course of the trial, wasn't it?

A. During the course of this trial, yes.

Q. And you got those from the office up there, did you?

A. I did.

Mr. La Shelle: These Petitioner's Exhibits No. 46 and 47 for Identification, your Honor, we offer in evidence as the same numbers.

Mr. Walsh: Your Honor please, I am going to object to the introduction in evidence of these documents at the present time. They haven't been properly identified. The fact that they're in the files of

(Testimony of Charles W. Ebnother.)

the Hedgeside Distillery has no particular significance. [1194]

Mr. La Shelle: If I may point out to your Honor here—we'll take the latest one. This is simply by way of clarification.

Mr. Walsh: Which one—

Mr. La Shelle: I am taking the top one, the latest one, 47; it's underneath the certificate of ownership. It has the big printed letters "Application by Proprietor of Internal Revenue Bonded Warehouse" and under the rules and regulations of the ATU in getting proprietorship to qualify as a bonded warehouse, the Internal Revenue file this form 27-d and it's filed in triplicate, together with the usual bond and surety and then when it's approved, first the approval is recommended by the district supervisor (that's the local man) and in turn it goes back to Washington and it's eventually approved by the deputy commissioner, if it's approved at all, and then the copy—one copy of the approval is sent back to the proprietor and that constitutes his qualification as a bonded warehouse. They do not issue a permit or license as the state does for this particular type of operation.

Mr. Walsh: Your Honor please, I am going to withdraw my objection. I have examined the documents here and it shows this is a certified copy by the government.

The Referee: 46 and 47 for Identification now become 46 and 47 in evidence. [1195]

Mr. Fisk: I'm a little late, but I would like to

(Testimony of Charles W. Ebnother.)

move to strike it out on the grounds, for the purposes of the record, it's irrelevant, incompetent and immaterial.

The Referee: Objection overruled.

Q. Now, with reference to state licenses, I believe I am correct in stating that either Mr. Ward or I asked you to make a search for state licenses up there? A. That's right.

Q. And you were not able to find any, were you?

A. That's right.

Q. Had they been taken up when the corporation went bankrupt, to your knowledge?

A. I don't know.

Q. When the corporation went bankrupt, as I recall it, the Internal Revenue Department of the ATU called up and for brevity's sake, closed the place until you qualified on your surety, isn't that right? A. That's correct.

Q. But the surety has now consented to the substitution. A. That's right.

Q. That's for the purpose of the bonded warehouse. A. That's right.

Q. Now, Mr. Ebnother, with respect to Mr. R. I. Stone, are you familiar with his signature?

A. I believe I am, yes.

Q. And with reference to Mr. McMains, are you familiar with his signature?

A. Yes. [1196]

The Referee: Do you gentlemen want a recess this morning?

(Discussion off the record.)

(Testimony of Charles W. Ebnother.)

Mr. La Shelle: I have the originals here of Petitioner's Exhibit No. 43 in evidence. These are the originals for which substitutes have been——

Mr. Walsh: You mean, in evidence?

Mr. La Shelle: Yes, they're in evidence—no, they're for identification—my mistake. They begin with 3511 and the last one is 3545. They're not inclusive. That constitutes Petitioner's Exhibits No. 43 for Identification.

The Referee: Well, so there will be no misunderstanding, I think that a portion of 43 is in evidence, exclusive of the warehouse receipts.

Mr. Fisk: That's correct.

The Referee: And exclusive of some other——

Mr. La Shelle: Yes, that's right.

The Referee: (Continuing) memoranda that were stipulated would not be.

Mr. La Shelle: The invoices and cancelled checks are in evidence.

Q. Returning to the first certificate in this group, Mr. Ebnother, which is numbered 3511-B and purports to be signed by a Mr. McMains and a Mr. Stone, would you examine those signatures please? Are those the signatures of Mr. McMains [1197] and Mr. Stone?

Mr. Fisk: Just a minute.

Mr. Walsh: Just a minute, before you answer.

The Referee: Mr. Fisk or Mr. Walsh.

Mr. Fisk: Your Honor, I would like to examine this witness on a voir dire if he is going to testify to identify certain documents.

(Testimony of Charles W. Ebnother.)

The Referee: Very well.

Mr. La Shelle: No objections. Do you want to take a short recess or go over?

Mr. Fisk: Let's finish this part.

The Referee: We will finish this matter and go on——

Voir Dire Examination

By Mr. Fisk: Q. Mr. Ebnother, how long have you known Mr. McMains?

A. Since June, 1949.

Q. Since June, 19 what? A. '49.

Q. 1949? When did you first see him?

A. I don't remember the exact date but it was after I was named as the receiver at Hedgeside.

Q. And where did you first see him?

A. At Hedgeside Distillery.

Q. At Napa? A. At Napa.

Q. And since that first occasion, how many times have you seen him since then?

A. Oh, I would say about three or four.

Q. And on each instance at Hedgeside?

A. Yes. [1198]

Q. Have you ever received any correspondence from him?

A. I may have received a short note or so from him; I'm not positive as to that.

Q. Have you ever seen him sign his signature to any document?

A. I can't say that I have positively.

Q. Have you ever written any letters to him and received a reply from him?

(Testimony of Charles W. Ebnother.)

A. I am not sure, Mr. Fisk, because I think our business was transacted over the telephone, what business we did transact.

Mr. Fisk: Your Honor, I am going to object to examining this witness along the lines counsel has commenced on the grounds that there is no foundation laid to establish or identify the signature of McMains. Here, the witness has said he has only known him for a short period of time, he never received any correspondence from him or ever saw him sign his signature that he recalls, and he didn't even know him at the time that these documents were presumably executed.

Mr. La Shelle: Your Honor, before that matter is submitted, may I ask if you wish to ask this witness anything on voir dire as to Mr. Stone's signature?

Mr. Walsh: That's not before us.

Mr. Fisk: We will come to that when we get there. You haven't asked him about Stone's signature, have you? [1199]

Mr. Walsh: Oh, yes, he has.

Mr. Fisk: Has he?

Q. Well, I'll ask you the same thing with respect to Mr. Stone. How long have you known Mr. R. I Stone? A. Since June, 1949.

Q. Where did you first meet him?

A. In San Francisco, in the—I believe it was in the office of Mr. Ehrlich.

Q. And how many times have you seen Mr. Stone since you first met him?

(Testimony of Charles W. Ebnother.)

A. Numerous times.

Q. Numerous times? A. Yes.

Q. Have you ever had any correspondence with him?
A. I have received letters from him.

Q. Didn't you ever write him any letters?

A. I do not remember that I did.

Q. You don't recall ever writing him a letter?

A. No.

Q. And I take it that it is also your testimony that you never received any letters from him in response to any inquiry on your part, is that right?

A. I have received one letter from him which I have now.

Q. And was it in response to an inquiry you made of him?

A. No, not directly. Indirectly, in a way it was.

Q. You didn't see him sign the letter you had in mind. A. No.

Q. You don't know whether he signed or not.

A. Well, the only assumption I can make is that he did sign it.

Q. Did you ever see him sign his signature?

A. Yes.

Q. Where? A. At Hedgeside Distillery.

Q. And when?

A. I can't recall the exact date. I've seen him sign letters there in his own capacity that he was sending out.

Q. How often?

A. Oh, I would say perhaps a dozen or so at sometime or another.

(Testimony of Charles W. Ebnother.)

Mr. Fisk: That's all.

By the Referee: Q. Do you feel as though you could identify Mr. Stone's signature?

A. With reasonable accuracy, yes.

By Mr. Fisk: Q. You never saw him sign his name or receive any letters from him in response to any inquiries of your own prior to June, 1949.

A. No.

The Referee: Do you have anything, Mr. Walsh, on this objection?

Mr. Walsh: I have on the objections put in on the voir dire.

Mr. La Shelle: Before your Honor rules, may I ask him one or two questions, your Honor?

The Referee: Surely. [1201]

By Mr. La Shelle: Q. Mr. Ebnother, under my prior examination before Mr. Fisk examined you, when I asked you if you were familiar with Mr. McMains' signature and Mr. Stone's you said you were. With reference to Mr. McMains' signature only, will you just explain to the Court upon what basis you stated that you were familiar with his signature? In other words, what do you base that statement on? What have you observed with reference to his signature and where and when?

A. Well, I've seen many signatures of W. S. McMains in the records of Hedgeside Distillery. I have talked to Mr. McMains in regard to these warehouse receipts and I don't know this particular bunch, but in regard to the—warehouse receipts and Mr. McMains never at any time said that the

(Testimony of Charles W. Ebnother.)

signatures involved in those warehouse receipts were not his.

Mr. Walsh: Now, just a minute, your Honor please, I am going to ask that go out.

Mr. Fisk: Go out as hearsay.

The Referee: So ordered.

Q. Not with reference to what Mr. McMains may have told you because that's hearsay. You stated you saw his signature on various things. What did you see his signature on up there in addition to warehouse receipts, if you saw his signature on anything other than a warehouse receipt?

Mr. Walsh: Now, if your Honor—Just a minute, I am going to object to that question as incompetent, [1202] irrelevant and immaterial. We are entitled to have the witness be shown the particular documents which he said that he recognized his signature.

The Referee: He may answer. Overruled.

A. Well, that's rather hard to answer specifically, but there were letters in the files there that—memorandums and things of that kind that McMains had signed in the course of his work.

The Referee: Pardon me, Mr. La Shelle.

By the Referee: Q. Mr. Ebnother, supposing I told you that Mr. Stone had signed Mr. McMains' name to some of these warehouse receipts, could you tell me that he didn't, that it was McMains that signed them?

A. Well, no, that's a matter for a handwriting expert, your Honor.

(Testimony of Charles W. Ebnother.)

Q. Did you ever see McMains sign his name?

A. I'm not positive whether I have or not. I've seen him do clerical work there in the office and I'm not positive whether I have ever seen him sign or whether I haven't.

Mr. La Shelle: If it please the Court, any objection here I submit goes to the weight and not the admissibility of this evidence and I might review certain things in this case in connection with that. We have here in evidence and not for identification, but in evidence, contracts between petitioner and [1203] Hedgeside and Franciscan calling for the production of certain spirits. I won't go into details of those. You know generally, what those were. We have in evidence invoices covering the spirits. Those invoices set forth the serial numbers of the barrels, the number of barrels, the dates. We have checks of Schenley in evidence covering those. The warehouse receipts in question tally with those invoices not only as to the number of barrels but as to the serial numbers in question, so we have a chain there of evidence showing the contract to purchase in good faith, payments made by actual cancelled checks in evidence covering the invoices, the invoices tally in all respects with serial numbers and number of barrels with these various warehouse receipts in question, so that we have a substantial trustworthiness, you might say, that these were issued along with those invoices. We have this man here who is the trustee in bankruptcy, who I am sure the Court has faith and in-

(Testimony of Charles W. Ebnother.)

tegrity in, and I know that I have. He states that he is familiar with those signatures. Under those circumstances, I submit that any objection goes to the weight and not admissibility, and I might state this, your Honor. I state this for the record. That Schenley, as the petitioner in this case, does not stand in the shoes of the bankrupt. We're not to be clothed with whatever [1204] nefarious things were done by the bankrupt or its officers and we're not to be put in the position of being accused of not putting on the proper witnesses because we don't produce men in whom we have very little faith ourselves.

The Referee: Well, Mr. La Shelle, my answer to that is that no one, including the Court, is putting Schenley's in the same position as the bankrupt or any of the officers of the bankrupt. However, I do think that you made a misstatement, namely, the witness here has testified that he never, to his knowledge, can recall seeing Mr. McMains sign his signature. He said that he may have seen him write or make a memorandum or something to that effect. Now, knowing that Mr. McMains, as far as I am concerned, is still available and knowing that Mr. R. I. Stone has seen Mr. McMains sign his signature and knowing that he is available, I am going to sustain the objection as far as Mr. McMains' signature is concerned with Mr. Ebnother's proof.

Mr. La Shelle: Well, I mean, as far as that's concerned, I'll tell the Court right now and oppos-

(Testimony of Charles W. Ebnother.)

ing counsel, that I will go to great lengths in this case to avoid putting Mr. Stone on the witness stand. I want no part of him.

The Referee: Very well, but Mr. McMains is the [1205] man that we're trying to identify his signature and until the Court can be shown that Mr. McMains is not available or that his deposition cannot be taken, I'm not going to permit his signature to be proven through Mr. Ebnother.

Mr. La Shelle: I have other witnesses that can qualify Mr. McMains' signature as well as himself, your Honor.

The Referee: Well, that's the only matter that is before us at the moment.

Mr. La Shelle: Can we recess for a moment?

The Referee: Mr. Walsh wants to comment.

Mr. Walsh: You surprise me by the statement you made that you are going to accept the testimony as to Mr. Stone's signature. I submit, your Honor——

The Referee: No, I didn't say that. I said Mr. Stone certainly knows Mr. McMains' signature. Certainly, Mr. Stone would be a better man to testify as to Mr. McMains' signature. I didn't say anything about Mr. Stone's signature.

Mr. Walsh: I want to be sure now——

The Referee: That matter is not before the Court.

Mr. La Shelle: May I ask this, your Honor? As I understand it——

(Testimony of Charles W. Ebnother.)

The Referee: Now, just a minute now. Let Mr. Walsh finish. [1206]

Mr. Walsh: Your Honor well knows that we are entitled to examine the witnesses whose signatures are placed upon those documents when they certify their signature to those documents. We're entitled to examine the witness to find out when these documents were signed, were they signed before the warehouse receipts were issued to the bank. Your Honor knows, there are duplicate warehouse receipts in this proceeding.

The Referee: Mr. Walsh, you are just anticipating. You haven't lost anything. The only matter that was before the Court was the objection made by the trustee in bankruptcy and by the Anglo Bank to the identification of McMains' signature by Mr. Ebnother. There was an objection. Now, that's the only matter that the Court has been asked to rule on and that's the only matter that I would rule on.

Mr. Walsh: For the record, I want to make this statement. Mr. La Shelle is very careful to tell the Court that we did not subpoena Mr. McMains to testify as a witness. He has told us at least three times that he would have Mr. McMains in here as a witness to testify to certain matters in this proceeding. Now, he comes in today with a letter, stating he can't get Mr. McMains. That isn't by virtue of serving a subpoena on him.

The Referee: No, he didn't. Now, let's be fair. What [1207] Mr. La Shelle did do, he read a letter that he had received with reference to the avail-

(Testimony of Charles W. Ebnother.)

ability of Mr. McMains and I think that's as far as it went. He read the letter.

Mr. La Shelle: I'll state right now that I never have had Mr. Stone under subpoena and I don't think I've had one witness out of a hundred under subpoena in my whole professional career.

The Referee: Well, we're talking about Mr. McMains.

Mr. Ward: If I might say in connection with Mr. McMains, I have been in constant correspondence with him on changing trial times when we think we will be able to get to him next time and I have to call him up and I say: "Mr. McMains, you will have to put it over." At least three times, I have had him lined up to come down on a definite date and made hotel reservations, without the necessity of a subpoena, Mr. Walsh, and finally yesterday, I received that letter from him that he could not be here. At the present time, that's the status of it.

Mr. La Shelle: In reading that letter which I did off the record, I am just as well aware as the Court and everyone else that legally that letter doesn't carry any weight at all.

The Referee: We'll have a recess. Go ahead, Mr. Fisk. [1208]

Mr. Fisk: In response to Mr. La Shelle's statement that under no circumstances he would call Mr. Stone, of course, that is his affair, but it is also his statement that he has no faith in any of these men, it seems to me is most unusual when he is predicating the whole basis of his case upon dealings

(Testimony of Charles W. Ebnother.)

with these men; whether they are honest or dishonest, he has got to prove his dealings with these men. I don't think that that is any reason, a logical reason, for refusing to produce somebody. Now, he doesn't have to produce anybody.

Mr. La Shelle: Just a moment, that is a matter of argument and is not quoting me correctly at all. I don't think the bank is any crazier about Mr. Stone than Schenley is in this case.

The Referee: The trustee is in the best spot then.

(Laughter.)

Mr. La Shelle: I don't think that Bill White of the bank is exactly enamoured with Mr. Stone and I don't think you are either. And I will put on whom I please without any help from the opposition. If I have to use someone, all right, I can use him reluctantly.

Mr. Fisk: Well, I see your reason for proving a man's signature with an announcement that you don't have any trust in him when you get him.

Mr. La Shelle: I'll be perfectly content with that. [1209]

The Referee: Very well, gentlemen, we'll have a recess first.

Mr. La Shelle: It might also be pointed out that you can subpoena Mr. Stone as an adverse witness and cross-examine him to your heart's content.

Mr. Walsh: You try your case your way and we'll try ours our way. (Laughter)

(A brief recess was taken.)

(Testimony of Charles W. Ebnother.)

Mr. La Shelle: In this group, which is Petitioner's No. 43—no, 49 for Identification, I think I previously referred to it as 43, didn't I?

Mr. Ward: 43, you said before.

Mr. La Shelle: Well, it is 49—49, beginning with 3511 and ending with 3407, during the recess, Mr. Ebnother, you went through those warehouse receipts and on 3511, 3678 (will you check these with me) 338, and 3383 and 3403 and 3525—

The Referee: Just a minute—3525, that's not a part of that same exhibit, is it?

Mr. La Shelle: Oh, that's where I made my mistake, your Honor. I had two groups of exhibits together—43 was on the bottom. Strike 3525; on that group of Petitioner's Exhibit No. 49 for Identification, warehouse receipts I just read to you, with the exception of 3525, purport to bear the signature of R. I. Stone, is that correct? [1210]

The Referee: Mr. La Shelle, just a minute. For clarification, according to the Court's record, the lowest number of warehouse receipts in Petitioner's 49 is warehouse receipt 3381.

Mr. La Shelle: That's right.

The Referee: And the highest one is 3407.

Mr. Fisk: That's in the first group.

Mr. La Shelle: That's right.

The Referee: Do you agree?

Mr. La Shelle: That's right.

The Referee: Now, ask the question.

Q. Those numbers I read off to you purported

(Testimony of Charles W. Ebnother.)

to bear the signature of R. I. Stone, is that correct?

A. Yes.

Mr. Fisk: Wait a minute, the numbers purport to—

Mr. La Shelle: No, those warehouse receipts having that number purport to bear the signature of R. I. Stone and he said yes, is that correct?

The Witness: Yes.

Q. Now, from your familiarity with Mr. Stone's signature, would you say that that is his signature?

Mr. Walsh: Just a minute, if your Honor please, I am going to object to that question as incompetent, irrelevant and immaterial and not the proper foundation laid.

Mr. La Shelle: I'll submit the objection. [1211]

The Referee: Just a minute, so we will have no misunderstanding. According to the Court's exhibits for identification in 49, the name R. I. Stone is on 3381, 3383, 3403 and that's all. What other one did you have?

Mr. La Shelle: I had 3678 and 3511.

The Witness: Here is 3511.

Mr. La Shelle: 3678—I'll have to look at the schedule; they may have gotten mixed up. These are the originals and they're supposed to be in the same condition as the ones that are in evidence, your Honor.

The Referee: I've got all of them here. Which one are you talking about now—36 what?

Mr. La Shelle: According to my records of my copy of Petitioner's Exhibit 34 for Identification,

(Testimony of Charles W. Ebnother.)

which is the schedule, the first group which Fred has at times referred to as the first group in the schedule starts with 3381-B and the highest is 3407, so that there is in this group some that don't belong here; they've gotten mixed up.

Mr. Ward: Those go into Petitioner's Exhibit No. 50 and 51. 3687, for example, is in 51; 3511 is in Petitioner's No. 50.

Mr. La Shelle: Well, then, I'll limit to Petitioner's Exhibit 49 for Identification, having checked with the Court, only 3381, 3383 and 3403 purport to bear Stone's [1212] signature in that group. Is that right, your Honor?

The Referee: Those are the three warehouse receipts the Court has.

Mr. Ward: There is one other according to my record that should be there—the last one, 3407, which I think the Court said was the highest number.

The Referee: Yes, but it doesn't have Stone's signature.

Q. Referring to those warehouse receipts alone, 3381, 3383 and 3403 which you have examined here recently, would you state that that is Mr. Stone's signature?

Mr. Walsh: Now, just a minute, if your Honor please, I object to that as incompetent, irrelevant and immaterial, not the proper foundation laid and I might state for the record, my argument on the statement that the proper foundation has not been

(Testimony of Charles W. Ebnother.)

laid is that there is no evidence in this record that Mr. Stone cannot be produced.

Mr. Fisk: I make the same objection, that the witness testified himself that he is not a handwriting expert or qualified to pass on signatures with regard to Stone. He has testified that he has seen his signature but that doesn't qualify him to identify signatures—handwriting signatures.

The Referee: Do you think you know Mr. Stone's signature, Mr. Ebnother? [1213]

The Witness: I believe I do.

Mr. Walsh: If your Honor please, that is not the question, whether he knows the signature or not. That is secondary evidence. The fact that Mr. Ebnother will testify that he knows his signature. Now, if there was evidence in the record to show that Mr. Stone could not be produced to identify his own signature, the secondary evidence could be accepted to identify his signature and prove that that's his signature and it goes beyond that. We're entitled to examine Mr. Stone as to the circumstances surrounding the signing of that signature.

The Referee: Which goes to the weight of the evidence.

Mr. Walsh: It doesn't go to the weight. It goes to the admissibility, if your Honor please. I'd like to submit a brief on that.

The Referee: Mr. Ebnother informs the Court and also in his examination that he has seen Mr. Stone sign his name on numerous occasions and he

(Testimony of Charles W. Ebnother.)

has told me now that he thinks he can identify Mr. Stone's signature.

Mr. Walsh: He doesn't testify that that is Mr. Stone's signature. If he testified he knows positively that is Mr. Stone's signature, that would be well and good, but he hasn't testified to that.

The Referee: Is it Mr. Stone's signature, Mr. Ebnother? [1214]

The Witness: Well, to the best of my belief, it is.

Mr. Walsh: I know, but that isn't sufficient. In other words, you have Mr. Stone available to come in and testify that he did sign that document. It's no different than any other document that you are attempting to introduce in evidence.

Mr. La Shelle: May I just ask——

Mr. Walsh: Wait a minute. Just a minute, Mr. La Shelle. In other words, to have secondary evidence as to the signature on a document regardless of what the document is, you have to produce evidence to show that the man that signed that particular document is not available and cannot testify.

Mr. La Shelle: May I ask this? Are either you or Mr. Fisk going to contend or introduce any evidence that this is not Mr. Stone's signature?

Mr. Walsh: We'll try our case the way we think. You are trying your case now.

Mr. La Shelle: We have made the objection, your Honor.

The Referee: Objection overruled.

(Testimony of Charles W. Ebnother.)

Mr. Fisk: Has the witness answered the question?

The Referee: No. Mr. Fisk and Mr. Walsh added to the objection and the Court overruled the objection. That's the way the record stands at the moment. [1215]

Mr. La Shelle: You answer the question.

The Witness: May I have the question again, please?

(The Reporter read the last question as follows):

“Question: Referring to those warehouse receipts alone, 3381, 3383 and 3403 which you have examined here recently, would you state that that is Mr. Stone's signature?”

A. Yes, it is.

Mr. Fisk: Well, what is his signature?

Mr. La Shelle: The signature on those three warehouse receipts.

Mr. Fisk: Well, have you looked at the three?

The Witness: Yes, I have.

Mr. La Shelle: Your Honor, if there is any receipt they are going to cross-examine on——

The Referee: It isn't cross-examination; it's merely for clarification of the record. In other words, Mr. Fisk is entitled to know the signature on what?

Mr. La Shelle: I read out the numbers—3381, 3383 and 3403 from Petitioner's Exhibit 49 and he was referring to the purported signatures of Stone

(Testimony of Charles W. Ebnother.)

on those three warehouse receipts, your Honor. Is that right?

The Witness: That's right.

Mr. Fisk: You recall seeing those specific warehouse receipts and the signature of R. I. Stone on those?

The Witness: Yes. [1216]

(Discussion off the record.)

Q. Mr. Ebnother, I show you Petitioner's Exhibit for Identification No. 43 consisting of certain warehouse receipts; 3525 purports to bear the signature of R. I. Stone?

Mr. Fisk: Wait just a minute so I can follow. Would you give me some idea what group you're in?

Mr. La Shelle: 43. I'll reframe the question.

Q. 3525, 3541, 3543, 3544, and 3545 of the warehouse receipts in this group purport to bear the signature of R. I. Stone. Have you examined those as I turned them over? A. I did.

Q. And would you say that that's the signature of R. I. Stone? A. Yes.

Mr. Fisk: Same objection.

Mr. Walsh: May it be understood for the record that the same objection applies to all of this?

Mr. La Shelle: It may be stipulated that they made the same objection, your Honor.

The Referee: Very well, the stipulation is accepted.

Mr. La Shelle: Your Honor, unfortunately, I find that the balance of this group has become a little mixed up and doesn't tally with what you have.

(Testimony of Charles W. Ebnother.)

During the noon hour, I would like to check those against——

The Referee: Mr. La Shelle, is that on 43?

Mr. La Shelle: No, 43 tally perfectly. The balance of these I would like to have the opportunity during the [1217] noon hour of checking them and getting them in order because they become a little mixed up. So I suggest a recess at this time.

The Referee: Very well.

Afternoon Session—2:00 o'clock p.m.

Mr. La Shelle (Continuing): Q. Referring now, your Honor, to Exhibit 50 in evidence which is warehouse receipts beginning with 3511 (for the benefit of Mr. Fisk over there, that's the second group on the schedule; I am not going to bother reading the B's here—just the number; on the warehouse receipts, they all have B's), referring to 3511, 3512 and that's all, that purport to bear the signature on the line "countersigned by," is that Mr. Stone's signature? A. It is.

Q. Now, referring to 51, which is partly in evidence and partly in identification, the warehouse receipts which are not in evidence and the other documents are, so from the standpoint of the record, when I refer to exhibit in evidence here, the warehouse receipts are the same identical number as the evidence number of the checks and the invoices, etc. that are in evidence as shown by the record, this is No. 51, which begins with warehouse receipt No. 3674, referring to 3678, I direct your

(Testimony of Charles W. Ebnother.)

attention to the signature purported to be of Stone and that was the only one in that group. Is that Mr. Stone's [1218] signature? A. It is.

Q. Referring to the next group of exhibits, which is 52, which begin with 3364, I direct your attention to 3365, 3397, 3414, the signature purporting to be that of R. I. Stone on those numbers I read out to you, would you say that was his signature?

A. I believe so.

Q. Taking the next group, which is 53, directing your attention to the following receipt numbers: 3482, 3484, 3486, 3505, 3509, 3510, 3567, 3568, 3569, 3572, 3573, 3575, 3590, 3592, 3593, 3597, 3598, 3602, 3606, 3610, 3616, 3619, 3621, 3622, 3623, 3624, 3629, 3631, 3665, 3669, and 3670, all of the warehouse receipts bearing the numbers that I just called out which I have shown you, Mr. Ebnother, purport to bear the signature of R. I. Stone, would you say that in review of those signatures that those were Mr. Stone's signatures on those warehouse receipts?

A. I believe it is.

Mr. Fisk: What is your answer, Mr. Ebnother?

The Witness: I believe it is.

Mr. Fisk: You believe it is.

Q. Now, Mr. Ebnother, I have here, I believe its petitioner's Exhibit 6 for Identification, one of the schedules (could I have that, your Honor), referring to Petitioner's Exhibit No. 6, your Honor, (I have used duplicates of that to make certain checks of warehouse receipt numbers for the witness to use in reference), referring to warehouse

(Testimony of Charles W. Ebnoter.)

receipt book beginning with the sequence of numbers 3151 and running [1219] to 3200, of the books which are in evidence, Petitioner's Exhibit No. 2 on this schedule, opposite the warehouse receipt numbers I have drawn a check and on some of them I have drawn an "X". I'm going to run down those. The ones with the check purport to bear Stone's signature; the ones with an "X" do not purport to have his signature at all. So, 3196——

Mr. Fisk: Is the question the ones that purport to have Stone's signature? The document speaks for itself.

Mr. La Shelle: I'm only trying to direct the witness's attention to it. 3198—as I turn to these certificate numbers, would you be good enough to examine the signature on them?

The Witness: All right.

Q. 3198, 3200—What is the next number?

A. 3204.

Q. 3204, 3206, 3211——

The Referee: Not 3211—3213.

Mr. La Shelle: Strike 3211.

Q. 3214—— A. No, 13.

Mr. Fisk: What about 3214, did you pass that or not?

Mr. Walsh: Not yet.

Mr. Fisk: 14 comes before 13.

The Witness: We did pass it. It isn't signed by Stone. [1220]

Mr. La Shelle: In other words, 3211, counsel,

(Testimony of Charles W. Ebnother.)

and 3214 do not even purport to bear Stone's signature, but 3213 does.

Q. 3213, 3217—

Mr. Walsh: Well, now, Mr. Ebnother is not saying anything so I don't see how we can follow anything that is going on.

The Witness: I know, but just one point here. Now, when you get through we'll have a list here with a lot of checks on it.

Mr. La Shelle: I am asking you to look at these warehouse receipt numbers of the numbers that I call out which purport to bear the signature of Stone. Then when I'm through, I'm going to ask you if those signatures you saw on those numbers were his signature.

Mr. Walsh: Why can't he just go through the book himself, Mr. La Shelle, and read the numbers of the warehouse receipts that bear those signatures; otherwise, it's hard to follow him because he nods his head.

Mr. La Shelle: Because there are a lot of other warehouse receipts issued to other people.

Mr. Walsh: I think the proper way, your Honor, is to let him take the books and identify them.

Mr. La Shelle: I have singled them out.

Mr. Walsh: It's a leading question when he asks him— [1221]

Mr. La Shelle: I have a right to ask him a leading question.

Mr. Walsh: He is not an adverse witness. You

(Testimony of Charles W. Ebnother.)

have not called him as an adverse witness. Let the record show that.

The Referee: Could we handle it this way, Mr. La Shelle? You just go through the book with Mr. Ebnother and stop at those places where eventually you are going to ask him a question, let him look at those warehouse receipts.

Mr. La Shelle: That's what I have been doing.

The Referee: We won't have any question in the meantime. Then when you get through going through the list there, you ask him a question and counsel on both sides will have an opportunity to protect themselves.

Mr. La Shelle: That is exactly what I have been doing, your Honor.

Q. 3217? A. Check.

Q. 3218? A. Check.

Mr. Walsh: What was your answer?

The Witness: Check.

Mr. Fisk: He's going to ask him a question at the end of all of this.

The Witness: What did you want me to say?

The Referee: I want you to say nothing, Mr. Ebnother, until Mr. La Shelle gets through calling these numbers [1222] out.

Q. 3218, 3222—

Mr. Fisk: I would like to have the record show he didn't even look at that document.

Mr. La Shelle: Well, now, Mr. Fisk—

Mr. Fisk: I am looking right at him.

The Witness: Which one, sir?

(Testimony of Charles W. Ebnother.)

Mr. Fisk: 3218; he didn't even look at them.

Mr. La Shelle: Well, you are imputing the good faith and motive of this witness.

Mr. Fisk: No, I am not imputing anything.

Mr. La Shelle: You certainly are. Here is a witness that is trying to cooperate and all you do is cast slurs on him.

Mr. Walsh: Your Honor please, I ask that that go out.

Mr. La Shelle: I ask that it stay right in there.

Mr. Walsh: You think you are trying a personal injury case over in San Francisco.

Mr. La Shelle: What you think you are trying is out of this world, Frank.

Q. 3222, 3224, 3226, 3227, 3228, 3231, 3232, 3234, 3235, 3237, 3242, 3243, 3248, 3250,—

(Discussion off the record.)

Q. This is the next book, your Honor, Petitioner's Exhibit No. 4 in evidence, with the sequence of warehouse receipts [1223] running from 3251 to 3300, starting with 3251, 3254— A. No.

Q. Has the word cancelled written over some signature. Can you make that out?

Mr. Walsh: Now, just a minute, if your Honor please, I object to that question. The warehouse receipt itself shows that it has no signature of the Hedgeside Distillery on it and the only signature on it is the counter-signature which has the word "cancelled" over it.

Mr. La Shelle: I'm only asking if the witness

(Testimony of Charles W. Ebnother.)

can figure out what the signature is over the word "cancelled." I am just asking him if he can.

Mr. Fisk: It only shows the fallacy of the examination.

The Referee: I don't see the materiality of it.

Mr. La Shelle: I am qualifying the signatures of Stone, your Honor, and it would appear to me in giving testimony that Stone is there, but the word "cancelled" is written. I am just simply asking the witness if he is able to make out any signature in connection with the word "cancelled"; if he says no, that's the end of it; if he says yes, he can answer.

The Referee: Supposing he says yes, how would that affect 3254? It isn't signed by Hedgeside. What is the materiality of this particular warehouse receipt in [1224] these proceedings.

Mr. La Shelle: This is a warehouse receipt issued to Barnhill on which we trace our chain of title. It was exchanged for other warehouse receipts; your Honor may have forgotten.

Mr. Fisk: No presumption——

The Referee: There is no signature as far as this warehouse receipt is concerned, is there?

Mr. La Shelle: This only has the signature of Stone, as I said, on the counter-signature. In other words, they overlooked the signature. The point of it is, (your Honor may have forgotten the early part of this case) this is some of the Heaven Hill whiskey and these were turned in for negotiable receipts and then the negotiable receipts were again

(Testimony of Charles W. Ebnother.)

turned in for non-negotiable receipts, so this is the first sale of that whiskey to which we trace our chain of title. That's the purpose of this.

Mr. Fisk: Is that document in evidence?

Mr. La Shelle: Sure, it is.

Mr. Fisk: It's in evidence?

Mr. La Shelle: Yes.

Mr. Fisk: What is the point of it?

Mr. La Shelle: I want to qualify these signatures of Stone.

The Referee: What exhibit is this? [1225]

Mr. La Shelle: No. 4.

The Referee: You may proceed.

Mr. Walsh: Wait a minute, No. 4 is for Identification, if your Honor please.

Mr. Ward: In evidence.

The Referee: In evidence subsequently.

Mr. La Shelle: I am simply asking the witness as to receipt——

Mr. Walsh: May I have a ruling on that objection?

The Referee: Objection overruled.

Q. Directing your attention to 352——

Mr. Fisk: The objection is overruled. Is there an answer in there?

The Referee: He hasn't got an answer to his question yet.

Mr. Fisk: What's the answer?

Mr. La Shelle: I was just going to repeat the question. I am sure the witness has forgotten it.

Mr. Fisk: Let the reporter read it.

(Testimony of Charles W. Ebnother.)

The Witness: The witness doesn't want to answer the question. You have it checked here as not being Mr. Stone's signature if I am going to rely upon this list—

(Laughter)

Mr. La Shelle: I don't want you to rely upon this list; I want you to rely upon what you see here. That's [1226] just for my own convenience of picking them out.

Q. 3254 appears to have some signature and then more or less over it is written in large ink, the word "cancelled." Do you make out any signature there and recognize it?

A. Well, my answer to that would be no.

Q. 3255, 3266, 3269, 3270, 3272, 3293, 3294, 3295; that's all in this book. One more. Referring to Petitioner's Exhibit No. 5 in evidence and directing your attention to receipt No. 3303, now with reference to those receipt numbers which you checked, were the signatures on those purporting to be those of R. I. Stone—his signature?

A. I believe they were.

Mr. Fisk: Same objection.

The Referee: It is stipulated that the same objection went to all of these matters with reference to Stone's signature and it's also understood by all three counsel that the Court's ruling was the same in all matters.

Mr. La Shelle: So understood, your Honor.

Mr. Fisk: I make an additional objection in

(Testimony of Charles W. Ebnother.)

these last cases that the documents are already in evidence, irrelevant, incompetent and immaterial.

The Referee: Overruled. And Mr. Ebnother's statement with reference to the one warehouse receipt was that you couldn't make out the signature.

Mr. La Shelle: That one number. I have forgotten what it was just now, your Honor. [1227]

Q. Now, Mr. Ebnother, when you took over as trustee of this bankrupt under the jurisdiction of this court, that was about in June, wasn't it?

A. I took over as receiver in June.

Q. Pardon me? A. As receiver in June.

Q. As receiver in June. And then later on, as trustee. A. Right.

Q. And when you took over as trustee, I take it, that you took over all of the assets of the company which you could find, did you not?

A. Yes, I did.

Q. And with reference to still houses, distillery warehouses, offices or buildings of that nature or the like, did you find any buildings of that character in any county other than Napa County?

A. No.

Q. In other words, the assets of the corporation, so far as offices, distillery, warehouses, and so forth, were all located at Napa, were they not?

Mr. Fisk: Well, I object to that as calling for the conclusion of the witness, your Honor.

The Referee: Mr. Ebnother can testify as to what assets he found with reference to the time you took over there with reference to the buildings and

(Testimony of Charles W. Ebnother.)

locations and so forth at that time that you found, so so far as the objection to his answer goes, why my ruling is in accordance with my statement. [1228]

A. They were all in Napa County; so far as I am able to remember, I'm sure they were. Franciscan is outside of that area but it's still in Napa County.

Mr. Fisk: Could I have the last answer——

A. (Continuing) The property of Franciscan Land & Cattle Company is a few miles away but it is still in Napa County, I'm certain.

Q. I think by that you mean, don't you, Mr. Ebnother, that the bankrupt corporation owns stock in Franciscan.

A. That's right.

Q. Franciscan owns the real property and Hedgeside owns the stock so that would be——

Mr. Fisk: I ask that that answer go out.

The Referee: So ordered.

Mr. La Shelle: Your Honor, this is cross examination.

The Referee: He is testifying as to the assets and the locations and so forth that he took over as trustee in bankruptcy.

Q. You did not take over the Franciscan assets, did you, as trustee?

A. Well, no, I took over the stock—the half interest in the stock.

Q. That's just what I wanted to develop. And

(Testimony of Charles W. Ebnother.)

the physical assets, such as, the buildings of the bankrupt corporation——

Mr. Fisk: What do you mean by a half interest in [1229] the stock?

The Witness: Half interest in the stock outstanding of Franciscan Land & Cattle Company.

Mr. Fisk: Your Honor, I ask that the answer go out. It's a conclusion of the witness as to what he took over. The written records of the two corporations will show that. I don't know what the half interest of the stock is.

Mr. La Shelle: What the witness means is that the assets of Franciscan that were owned by the bankrupt were stock, is that right?

A. That's right.

Mr. La Shelle: Stock of the Franciscan corporation.

Mr. Fisk: Your Honor, I object to that as leading and suggestive and it calls for the conclusion of the witness.

Mr. La Shelle: I have a right to lead this witness as an adverse witness.

Mr. Walsh: He has not the right to lead this witness.

The Referee: Just a minute, gentlemen. The thing we are concerned about is Mr. Ebnother's answer to your question and Mr. Ebnother said that as trustee in bankruptcy he took over a half interest in the stock of Franciscan. Is that what you testified to?

The Witness: Yes, sir.

(Testimony of Charles W. Ebnother.)

Mr. Fisk: But, your Honor, I object. That calls for a conclusion. If he wants to testify that he [1230] physically took over some stock then all right, but he didn't physically take over some stock; I happen to know that.

The Referee: I am just assuming the man understands the question.

Mr. Fisk: He doesn't understand the question at all. He's not a lawyer. He can't testify what the position was. Now, if he physically took over some stock of Franciscan, that's one thing; but he didn't.

Mr. La Shelle: I can avoid all of this, your Honor, on a very simple thing if counsel wish to stipulate to the facts. I am just simply trying to establish by this witness, among other things, that the principal place of business of this bankrupt corporation is at Napa, California, a fact which everyone in this courtroom knows.

Mr. Fisk: That wouldn't prove it.

Mr. La Shelle: No, but we've got to prove today is Tuesday.

The Referee: Then when you started asking about Franciscan there, there is an objection. We can't just forget about it.

Mr. La Shelle: He misunderstood and referred to Franciscan's physical assets as distinguished from the stock represented.

The Referee: Let me ask him; then we'll take care of [1231] the objection, too.

By the Referee: Q. With reference to Fran-

(Testimony of Charles W. Ebnother.)

ciscan, whether physical property or stock or documents or anything else, as trustee of Hedgeside, what did you take into your possession?

A. I took over a half interest in the Franciscan Land & Cattle Company—a half of the total outstanding stock of that corporation.

Q. Did you actually take—what I am trying to find out is, did you take certificates into your possession or did you take shares of stock or what did you take?

A. It's my memory that I took certificates. Mr. Fisk apparently doesn't agree with that, but I still think that that is the truth.

Mr. Fisk: Of course you didn't. I have got them myself.

Mr. Walsh: Mr. Ebnother, you don't mean that.

Mr. Fisk: Of course, you don't.

The Witness: Well, if I don't mean it—I'm still of the opinion that I did.

Q. In any event, Mr. Ebnother, you do understand Mr. La Shelle's question.

A. I do understand what Mr. Fisk is talking about—that stock was pledged at the Anglo Bank.

Q. Well, realizing the comments that have been made and the question that Mr. La Shelle asked of you, you're still [1232] willing, even though you may be wrong, your present answer is just as you gave it.

A. Yes, I would say it is.

Mr. Ward: I think the witness has used the word Franciscan—I think the witness had a few

(Testimony of Charles W. Ebnother.)

words after Franciscan. He was referring at all times to a certain company.

The Referee: Franciscan Farm & Livestock Company, is that it?

Mr. Ward: That wasn't my understanding.

The Witness: Franciscan Land & Cattle Company.

The Referee: Is that what we are talking about now?

Mr. La Shelle: No, what I am trying to develop—

The Referee: I know what you are trying to develop, but these series of questions of Mr. Ebnother as to the half interest he took over, was that the Franciscan Land & Livestock Company?

Mr. La Shelle: Well, the only name I know is Franciscan Farm & Livestock Company.

The Witness: Well, it might be that; I'm not positive which it is.

Mr. Walsh: Franciscan Farm & Livestock.

The Referee: And your answer still goes to the Franciscan Farm & Livestock.

Mr. La Shelle: What I am after here is in the way of what assets you took over, not intangible, such as [1233] stock certificates, but physical things, such as buildings and land and equipment with reference to the physical assets, buildings and land, offices under lease, all matters of that kind. Did you take into your possession any assets other than those located at Napa in Napa County, California?

A. No.

(Testimony of Charles W. Ebnother.)

Q. Now, Mr. Ebnother, on or about October 7, 1949, you were served with a copy of the original of this subpoena (and I am referring to the subpoena on file in this case) in which you were asked to bring with you among other things, public warehouse licenses for the fiscal years '43, '44, '48, and '49, inclusive, and distilled spirits manufacturer's licenses for the same fiscal years in question, as well as various other things, such as warehouse receipt books, most of which you have already brought in in response to the subpoena. Am I correct in understanding that the licenses listed in that subpoena, state licenses, you were unable to find?

A. I believe you are, yes, sir.

Q. You made a search but could not find it.

Mr. Walsh: For the purpose of the record, are you also speaking about a public warehouse license too?

Mr. La Shelle: Exactly that. Your Honor, I know that in one of my questions I apparently made a mistake. I referred to the subpoena on file. It's not on file. It was in my file. I'll file it now, if I may. That's all the questions I have of this [1234] witness, your Honor.

The Referee: Mr. La Shelle, do I understand, subject to anything that might be developed by the attorney for the bank or the attorney for the trustee, you have no further need for Mr. Ebnother in these proceedings?

Mr. La Shelle: I don't think so, your Honor, unless I've overlooked something. I hope I haven't.

(Testimony of Charles W. Ebnother.)

If I have, I reserve the right to recall him, of course.

The Referee: For the time being, you are completed.

Mr. La Shelle: Before I rest this case, I am going to have to review it pretty thoroughly and make sure I haven't overlooked something.

The Referee: Mr. Walsh, this is the day that you are required to adjourn early. Do you or Mr. Fisk anticipate any lengthy cross-examination of Mr. Ebnother?

Mr. Walsh: Well, I would like to examine him on some points, your Honor.

The Referee: Don't you think you could— Would you prefer to go on now?

Mr. Walsh: No, I would rather go on tomorrow.

The Referee: Mr. Fisk, what is your feeling?

Mr. Fisk: Well, I want to ask him a few questions.

The Referee: Well, we might as well then use up the time until three. Then Mr. Walsh, you can examine Mr. Ebnother tomorrow. [1235]

Cross-Examination

Q. (By Mr. Fisk): Mr. Ebnother, with regard to your search for documents requested in the subpoena which is referred to and filed by Mr. La Shelle in this proceeding, what specific documents did you look for?

A. It was as enumerated on that subpoena there.

Q. Would you look at this and state for the record, what documents you looked for?

(Testimony of Charles W. Ebnother.)

A. Public warehouse licenses— Do you wish me to read the numbers of all of them?

Q. I want to know what you looked for.

A. E959, 1948 and '49; E87-C, '47 and '48; E59-B, 1946 and '47; E98-D, 1945 and 1946; E130-H, 1944 and 1945; E-224-G, 1943 and 1944 and distilled spirits manufacturer's license K23D 1948 and '49; K14C, '47 and '48; K11B, '46 and '47, K422A, 1945 and 1946; K482H, 1944 and 1945; K644G, 1943 and 1944.

Q. Now, where did you make your search for the documents just referred to, generally speaking?

A. Well, I first looked in the little place on the wall where anyone would expect those documents to be and I looked there.

Q. On the premises of the Hedgeside?

A. Hedgeside office.

Q. What is the address of Hedgeside Distillery?

A. It's at Monticello and Atlas Road.

Q. And you looked through the records and files in the [1236] offices at that location, is that right?

A. Part of them, yes.

Q. And where else did you look?

A. I looked no place else but in that office there.

Q. Now, when you were looking for those documents and referring to the subpoena just referred to, do you know what is referred to when it says "public warehouse license"?

A. No, I wouldn't say that I did any more than what's described on there.

Q. Do you know what institution or body is re-

(Testimony of Charles W. Ebnother.)

ferred to in that statement—public warehouse license? Do you know what public body or political organization issues the documents referred to there?

A. No, I do not.

Q. You have no idea, is that right?

A. No, I do not.

Q. You just simply looked for a document bearing the letter and description and date that you just referred to, is that right?

A. That's right. As a matter of fact, I think later we found part of those licenses, but I don't have an exact record of what we found and what we didn't find.

Q. Well, then you think that maybe you did find some of these licenses.

A. We may have found some of those later on. The first time we looked for them, I reported back to Mr. La Shelle that I couldn't find them and my memory is that we later went [1237] into some old correspondence files and that we did find some of them. I'm not positive on it now.

Q. Are you now referring to public warehouse license or distilled spirits manufacturer's license?

A. The fact is I don't know, Mr. Fisk.

Q. You don't know. A. No, sir.

Q. In other words, some of the documents you have just referred to you think you have subsequently located but you don't know which ones.

A. Which ones.

Q. You don't know anything about what the contents of those documents are. A. No.

(Testimony of Charles W. Ebnother.)

Q. And you know nothing about the description, other than what's stated in the subpoena, is that right?

A. That's right, except by inference.

Q. Now, in answer to certain of Mr. La Shelle's questions, you stated that when you took over as receiver in this proceeding that you took physical possession of certain property which you believe belonged to the bankrupt, is that right?

A. That's right.

Q. You don't know in all respects whether or not the property you took possession of belonged to the bankrupt or not, do you?

A. No, I know it didn't, all of it.

Q. Now, you mentioned taking over a one-half interest in the stock of the Franciscan Farm & Livestock Company, do you recall that? A. I do.

Q. Do you mean that you took over a one-half interest in all [1238] of the issued and outstanding stock of that corporation?

A. That's my understanding.

Q. Did you take physical possession of any stock certificates?

A. Those stock certificates at that time, if my memory is correct, were——

Q. Wait just a minute. Did you get my question?

A. Did I take physical possession of those stock certificates.

Q. Of any stock certificates at that time. Now, you can answer that yes or no and then explain.

(Testimony of Charles W. Ebnother.)

A. At that time, no.

Q. All right, have you since that time taken over physical possession of any stock certificates of that corporation?

A. I have had them in my possession, Mr. Fisk, and I'm not positive whether I had them in my files or not—probably not.

Q. From whom did you obtain physical possession of those stock certificates?

A. I was in the Anglo Bank and I had them in my hands and saw them in the Anglo Bank.

Q. Did you remove them from the bank?

A. I'm not sure as to that.

Q. Do you have any recollection on it at all?

A. No, I do not.

Q. Do you know where they are at the present time? [1239]

A. No, I'm not. I either have them or they are still in the Anglo Bank. I'm not sure which. I think probably in the Anglo Bank.

Q. From whom did you obtain them at the bank?

A. I didn't answer definitely that I had obtained them, if I remember correctly. I think from somebody in the teller's cage at the time I examined them.

Q. You don't remember their names.

A. No.

Q. Can you fix the time? A. No.

Q. But you do know that you do not have physical possession of them now.

The Referee: He said that they were either in

(Testimony of Charles W. Ebnother.)

his possession or in the possession of the bank. Is that what you said?

A. I'm not sure, Mr. Fisk, whether I have physical possession of them or whether they're in the possession of the bank. They're probably still in the possession of the bank, knowing banks, but my mind's a little cloudy on it. I have a whole file of stuff on the Franciscan Land & Cattle Company and I doubt if that is in there.

Mr. Fisk: Well, now, your Honor, I was going into these warehouse receipts and I don't know whether I should start on them.

Mr. La Shelle: May I just mention one thing here, your Honor? My recollection has been, as I stated, that he made a search for those licenses and he did [1240] report to us that he couldn't find them. Today is the first intimation I have had at the cross-examination of Mr. Fisk that he thinks he found some of them. If he has, I'd like them because I have subpoenaed them and if they're available, I want them.

The Referee: As I gathered Mr. Ebnother's answer on cross-examination, he made an initial search and could not find the documents that you requested. Subsequently, it's his recollection that he found some of the documents in an old correspondence file but you were not definite as to just what the documents were.

The Witness: That's correct, but I am fairly certain that if I did find some, I turned them over to Mr. La Shelle with those— You remember, at

(Testimony of Charles W. Ebnother.)

the same time that I brought you this other stuff that you had photostated.

Mr. La Shelle: No, the 27-D is what he turned over.

Mr. Ward: The first search for the 27-D was fruitless also. The second search, he found them in a big box in which these seven warehouse receipts were and the minute book and the 27-D's were there in a correspondence folder. Those are the ones that I now have that we have introduced in evidence. Those were found on a second search.

The Referee: After Mr. Ward's statement with reference to the 27-D's, does that help your recollection? [1241]

The Witness: It's probably—what he has mentioned there is probably what I am thinking about because I know we did find something we said we didn't have which I brought down here and turned over to Mr. La Shelle the next trip.

The Referee: So any documents listed in Mr. La Shelle's subpoena, whether you found them the first or second time, they are not now in your possession.

The Witness: That's right.

The Referee: They're in his——

The Witness: They're in his possession.

The Referee: Regardless of what the documents are. It's three o'clock.

Mr. Fisk: I'll go ahead if the Court wants me to.

The Referee: Mr. Walsh told us two months ago

that three o'clock is departing time on Wednesday and he is going to have Mr. Ebnoter tomorrow.

(An adjournment was taken until Thursday, March 30, 1950, at 10:00 a. m.) [1242]

Thursday, March 30, 1950, 10:00 a. m.

CHARLES W. EBNOTER

having been previously sworn, resumed the stand and testified further as follows:

Cross-Examination (Continued)

By Mr. Fisk: Q. Mr. Ebnoter, is the Hedge-side Distillery premises in the City of Napa or just in the County of Napa?

A. In the County of Napa, I think—not in the city.

Q. You said it's on Atlas Way. Do you know the number?

A. No, I do not. There is no number there. It's the intersection of Atlas Way and Monticello Road.

Q. What is the mailing address—Box 269, Napa?

A. Yes, Box 26—I believe it's 269.

Q. Now, yesterday you were shown Petitioner's Exhibit 3 and asked to identify certain signatures in there with respect to Petitioner's Exhibit 6 for Identification, do you recall that? A. Yes.

Q. Do you know where this book was kept during the years '47 and '48? A. No, sir.

Q. Do you know who kept the books during those years?

A. Not positively. Mr. McMains was supposed

(Testimony of Charles W. Ebnother.)

to keep that record—did keep that record in the year '49. Whether he did before or not, I do not know.

Q. Well, now, you say he was supposed to. Do you know of your own knowledge that he kept it or not? A. No, I do not. [1243]

Q. I take it you also don't know whether he kept it or who kept it in the years '47 and '48.

A. No.

Q. Or '46. A. No.

Q. Or where it was kept. A. No.

Q. You testified yesterday that there had been certain immaterial changes made in these records. Were any such changes in this exhibit as far as you know?

A. I don't know what the changes were now, Mr. Fisk. They were of no—all I remember is that they were of no consequence in this way, that they simply completed that record there.

Q. Well, this Petitioner's 3, you say, was completed after you took possession of it?

A. There were certain cancelled receipts that were later put in the book which were not first in it.

Q. Well, by cancelled receipts, you are referring to the warehouse receipts?

A. The original warehouse receipts.

Q. You can't look at this book and tell which were placed in after you took over and which were not? A. No, I cannot.

Q. Take warehouse receipt 3204-B, do you recall that one? A. No, I don't recall it.

(Testimony of Charles W. Ebnother.)

Q. Well, didn't you examine it yesterday and identify a signature on it or do you recall?

A. Well, I identified a lot of signatures, Mr. Fisk.

Q. But you don't recall what you identified today with what [1244] you identified yesterday?

A. No, I do not without the record to refer to. I can't remember all those numbers.

Q. Then when you gave the statement in response to Mr. La Shelle's question that signatures on all of the warehouse receipts he called the numbers out that signature, R. I. Stone to the best of your belief was Stone, you don't know whether that's true or not, is that right?

A. That was correct at that time because I had the list right in front of me to which I could refer.

Q. Well, you didn't have the list right in front of you when you answered that question, did you?

A. I don't remember.

Q. Well, going back to warehouse receipt 3204-B, can you say whether or not that receipt was in that book when you took over as receiver.

A. No, I cannot.

Q. You cannot. A. No.

Q. And you don't know of your own knowledge whether or not this receipt was ever taken out of the book, do you? A. No.

Q. Now, would you answer those two questions the same way with respect to all of the other——

Mr. La Shelle: I object to the form of that ques-

(Testimony of Charles W. Ebnother.)

tion, your Honor. I don't think that's proper cross-examination.

The Referee: You mean, with reference to all of the ones that Mr. La Shelle asked him about yesterday. [1245]

Mr. Fisk: He interrupted me before I had a chance to finish.

The Referee: Very well.

Q. Would you answer those two questions the same way with respect to each of the warehouse receipts as to which you identified his signature yesterday?

Mr. La Shelle: I object to the form of that question, your Honor. I don't think it's proper cross-examination.

The Referee: Just a minute, Mr. La Shelle. Would you read the two questions that Mr. Fisk asked Mr. Ebnother?

(The questions referred to and the answers thereto were read by the Reporter.)

Mr. Fisk: I'll withdraw that.

Q. Take Petitioner's Exhibit 3 and tell me whether or not you can say there is any warehouse receipt in that book, either original or copy which you know of your own knowledge was not there when you took it over?

A. I can't answer that. That is, I can't—Will you repeat your question?

(The last question was read by the Reporter.)

A. No.

Q. And you don't know whether or not any of

(Testimony of Charles W. Ebnother.)

the original warehouse receipts in that book was ever at any time removed from the book, do you?

A. No, I don't believe I do. [1246]

Q. How long have you known Mr. R. I. Stone, the president of the bankrupt?

A. Since the early part of June.

The Referee: What year, Mr. Ebnother?

The Witness: Since the early part of June.

The Referee: What year?

The Witness: Oh, 1949.

Q. Have you ever had occasion to cash any checks of his?

A. No. Well, now, wait a minute. Wait a minute. I have received one or more checks from him, put it that way.

Q. Checks in which he was the maker?

A. Yes.

Q. And did you cash those checks?

A. Let me think a minute. I'm not even positive of that. I received a check from Mr. Stone, but I don't believe that he signed it in his personal capacity.

Q. Have you ever had any business transactions with Mr. Stone in which you relied on his signature?

A. In which I relied upon his signature.

Q. In connection with a business transaction.

A. I think the answer is no.

Q. With respect to any of the original warehouse receipts in Petitioner's Exhibit 3 as to which you identified the signature of R. I. Stone, do you know of your own knowledge when he placed his signa-

(Testimony of Charles W. Ebnother.)

ture on any of those documents? A. I do not.

Q. And you know nothing of the circumstances surrounding [1247] his placing his signature on the documents? A. No.

Q. Now, with respect to Petitioner's Exhibit 4 which was shown to you yesterday and as to which you identified certain signatures purporting to be signature of R. I. Stone, will you look at that exhibit and tell me whether or not you know of your own knowledge whether or not any of the original certifications were ever removed from that book?

A. No, I do not know if they were.

Q. And you can't say which of them, if any, were replaced in the book after you took over possession, is that correct? A. That's correct.

Q. Do you have any personal knowledge of when this signature of R. I. Stone was placed on any of those original warehouse receipts? A. No.

Q. Nor the circumstances under which it was placed on there. A. No.

Mr. Fisk: That's all I have.

The Referee: Mr. Walsh?

Mr. Walsh: The examination by Mr. Fisk covered the questions I was going to ask.

The Referee: Mr. La Shelle?

Mr. La Shelle: I just have a couple of questions here.

Redirect Examination

By Mr. La Shelle: Q. With reference to Exhibits 3 and 4 and the other warehouse receipt books

(Testimony of Charles W. Ebnother.)

that are in evidence—I forget the number. [1248]

The Referee: 1, 2, 3, 4, and 5.

Mr. La Shelle: And then there are quite a few others; I forget their numbers.

The Referee: These are marked for identification, Petitioner's Exhibit 59 and there are seven books.

Q. As I recall your testimony yesterday, when we referred to those seven books that are marked for identification as distinguished from the ones that are in evidence, it was with reference to those books that you said there were no material changes in them, wasn't that correct?

Mr. Fisk: I object to this, your Honor, as improper redirect examination.

The Referee: Overruled. You may answer.

A. Well, I don't know. As a matter of fact, when you say Exhibit 3 and Exhibit 7 that doesn't mean anything to me at all.

Q. Well, I'm referring to these books that we had yesterday, these seven books here that are Petitioner's Exhibit 59. My recollection is that when I asked you if those books were in the same condition as they were when you found them, it was with reference to these seven books that you said there was no material change and then you mentioned putting in some receipts that were loose.

Mr. Fisk: Well, your Honor, I object to that. The record speaks for itself. There is no use confusing the record. [1249]

(Testimony of Charles W. Ebnother.)

Mr. La Shelle: All right, I am asking the question.

The Referee: Just a minute. Mr. Ebnother, will you take a look at these seven books so you will familiarize yourself? Take a look at those seven books that are marked merely for identification No. 5 and Petitioner's Exhibit No. 1, 2, 3, 4, and 5 which are the five first books which were brought down here—one negotiable and four non-negotiable. Are you familiar with any difference between those books as far as their purposes here for the moment are concerned?

The Witness: You may answer. The objection is overruled.

(The last question was read by the Reporter.)

Q. Is that correct?

A. There have been no material change in those.

Q. I know, but was it with reference to these seven books, referring to exhibit—

A. The record would have to show that one—

Q. All right, now, did you find any copies missing from these books or was it originals that you put in, whatever they were?

A. There were quite a large number of originals missing from the whole group of books. As a matter of fact, still are.

Q. Well, if an original is issued and given to someone, naturally it's not in the book, is that right?

A. That's right.

Mr. Fisk: I object to that as calling for a conclusion [1250] of the witness.

(Testimony of Charles W. Ebnother.)

The Referee: Sustained.

Mr. Fisk: I ask the answer go out.

The Referee: Sustained.

Q. About how many receipts did you put in the books, roughly—all of these books put together?

Mr. Walsh: Your Honor please, I submit that's not proper redirect examination.

The Referee: Overruled.

By the Referee: Q. Mr. Ebnother, you testified yesterday that you found certain loose warehouse receipts in an old correspondence file at Hedgeside. Do you recall testifying to that? A. Yes, I do.

Q. Now, bearing that in mind, try to answer Mr. La Shelle's question.

A. Well, I can't answer it accurately but it was a very small number. There were not many of them. I would say, possibly four or five at the outside.

Mr. Walsh: Your Honor please, I submit that the question should show that these were warehouse receipts which were involved in this proceeding—not a general question, were there warehouse receipts found in the records over there.

The Referee: Well, Mr. Walsh——

Mr. Walsh: Just a minute. In all fairness to the [1251] witness, his attention should be directed to these particular warehouse receipts.

The Referee: Counsel on both sides have asked him with reference to material changes in these warehouse receipts and missing warehouse receipts and what is good for one side is good for the other, in my opinion.

(Testimony of Charles W. Ebnother.)

Mr. Walsh: I never asked him.

The Referee: Well, the question was here yesterday without objection with reference to some loose warehouse receipts that he found in explanation of his answer to a question that there were no material changes in these books from the time he took them over up until yesterday. And he explained material changes by saying that he found some loose warehouse receipts in an old correspondence file.

Mr. Fisk: Are you through, Mr. La Shelle?

Mr. La Shelle: No, I have a couple more questions here.

By Mr. La Shelle: Q. Under Mr. Fisk's examination a few moments ago, reference was made to some check which you believe Mr. Stone had given you and then you stated that in your recollection it was not a personal check or signed in his personal capacity. Was it a check of Hedgeside signed by Stone? A. No.

Q. What was the check? Did he sign the check at all in any capacity?

A. I don't think he did. [1252]

Q. You don't recall that.

The Referee: He says he doesn't think he did.

A. I don't believe he did, no.

Q. Now, with reference to the four or five or approximately that of things that you put back in the warehouse receipts in question here, do you recall whether those were copies or originals?

A. Well, they were originals.

(Testimony of Charles W. Ebnother.)

Q. And do you recall whether they were cancelled originals or not?

Mr. Fisk: Well, I object to that as calling for the conclusion of the witness. He can state whether it had a cancelled mark on it.

Mr. La Shelle: That's what I mean and I'll so reframe the question.

The Referee: Very well.

A. I can't answer that.

Q. Directing your attention to Petitioner's Exhibit No. 3 and the warehouse receipt that Mr. Fisk directed your attention to, 3204-B, would you please examine that with reference to the original which purports to be marked cancelled and the yellow copy and the pink copy with reference to the perforation of the stubs in the—do you find scotch tape there?

Mr. Walsh: Your Honor please, I submit that the document speaks for itself.

Mr. Fisk: The document speaks for itself.

The Referee: Sustained. [1253]

Mr. La Shelle: I direct the attention of the Court then from the physical evidence that the perforation between the receipt and the stub looks and that the original and two copies have scotch tape to hold them. That will be of some effect in this case at a later date on another witness.

Mr. Fisk: You mean to infer that the copies were removed as well as the originals?

Mr. La Shelle: Yes, the copies are pasted in with scotch tape too.

Mr. Ward: They would have to be taken out of

(Testimony of Charles W. Ebnother.)

the book, Mr. Fisk, and typed up, you know. You can't type the book all at once.

(Discussion off the record.)

Q. Mr. Ebnother, when you brought those seven books down, which are Petitioner's Exhibit No. 59, I believe, about when was it that you brought those down—what month of what year?

A. What month of what year?

Q. Yes. A. I don't remember now.

Q. I mean, about what time of what year—

Mr. Fisk: What do you mean by "brought down something"?

Mr. La Shelle: From Hedgeside.

Mr. Fisk: Brought it down to the courtroom, you mean, from Hedgeside?

Mr. La Shelle: Yes. You brought those down, did you [1254] not, from the Hedgeside plant at Napa?

A. Yes, I believe I did.

Q. Brought it down to the bay area, let's put it that way. A. Yes.

Q. And who did you give them to?

Mr. Walsh: Your Honor please, I am going to object to that question as incompetent, irrelevant and immaterial.

The Referee: What is the significance, Mr. La Shelle, might I ask?

Mr. La Shelle: Well, Mr. Fisk has asked a lot of questions about these books. These were brought down many, many months ago. At least three of them were found in the back of Mr. Fisk's Buick.

(Testimony of Charles W. Ebnother.)

The Referee: Well, tell me the significance.

Mr. Fisk: What's the significance?

Mr. La Shelle: I want to know if there is any question about any changes about those books, I want to know in whose possession they have been since they were brought down.

Mr. Fisk: Well, that's all right. I have no objection.

The Referee: Very well. You may answer, Mr. Ebnother?

A. Well, I can't answer that question.

Q. Well, you brought the books down, didn't you? [1255]

A. I believe I did.

Q. And then what did you do with them?

A. Well, when you take the aggregate group, frankly, I don't know how they were handled.

By the Referee: Well, let's help it out this way. When this proceeding first started quite a few months ago, you brought down five books into this courtroom. How many you brought from Napa, I have no idea. You brought five of them at that time and that's quite a few months ago.

A. That's right.

Q. Did you bring the other seven at that same time as the first five were brought into this courtroom?

A. I believe not. I believe they were brought up later.

Q. So then at a subsequent date, you brought these seven other books. Now, where did those books go when they left the office at Napa?

(Testimony of Charles W. Ebnother.)

A. Well, I can't answer that, your Honor, accurately or exactly because I don't remember at this stage of the game. They were not in anybody's—so far as I know, there was nothing done to them. There was no reason why I should remember exactly what——

Q. Well, Mr. Ebnother, we know this. We know that they were at the Hedgeside office.

A. Yes.

Q. Or they were at Napa, we'll say. We also know that you [1256] are here now sitting on the desk. Where have they been, other than those two places, in the interim?

A. Well, they were in Mr. Walsh's office, I believe, for a few days, part of them, and the only other place that I can think of would have been in the back of Mr. Fisk's car. I think they were in there for awhile.

The Referee: Very well, Mr. La Shelle.

By Mr. La Shelle: Q. Just one question here that I am getting for information, really, to make sure. The plant up there of the bankrupt corporation, if I got that right, it's Atlas Way and Monticello?

A. Monticello Road. I think it's on the——

Mr. Walsh: It's right on the warehouse receipt.

The Referee: Off the record——

(Discussion off the record.)

The Referee: Very well. Anything further, Mr. La Shelle, Mr. Fisk or Mr. Walsh?

Mr. Walsh: Yes, I would like to ask one ques-

(Testimony of Charles W. Ebnother.)

tion along the line of Mr. La Shelle's examination.

Re-Cross Examination

By Mr. Walsh: Q. Now, Mr. Ebnother, did any representatives of the Schenley Distillery Company examine these records at Hedgeside Distillery while you were there? A. Yes.

Q. Who? A. Mr. Johnson.

Q. Yes. Did he examine these particular warehouse receipt books? [1257]

A. Well, the way the work was done there, the first time Mr. Johnson was there, he had the pencil work sheet; I had the receipt books and I called the numbers and the description from the receipt to Mr. Johnson and he recorded them. He did not see each one because at that time we didn't know how this thing was going to go or who would know and who wouldn't know and I deemed it advisable to keep control of the books myself and only to pass the information on to him.

By the Referee: Q. When you say he didn't see each one, what do you mean—he didn't see every book or every receipt?

A. Well, he sat here (indicating) and I sat here (indicating); he had the pencil and the number of sheets of work paper and I would call—I had the books in a pile in front of me and I would call the number, who the receipt was made to, what it covered and the complete description which he recorded on his sheet, the only exception being that on those receipts which were not Schenley receipts, I did

(Testimony of Charles W. Ebnother.)

not call the name of the person to whom it was made out. I figured that that wasn't any concern of his. So if it was Schenley receipt, why I would call it Schenley and the number and all about it; if it was another receipt, I would call the number and the same information but I left out the name of the person or company to whom the receipt was made.

By Mr. Walsh: Q. Were these particular warehouse receipts that you found [1258] in the other records of Hedgeside placed in the books before Mr. Johnson examined them?

A. That I don't remember, Mr. Walsh. In my opinion, those were not of any value anyway so I gave very little attention to it. You see, I just figured they were there; in order to put them where they could be found, they were put in the books where they belonged.

Q. Isn't it a fact, Mr. Ebnother, that a certified public accounting concern representing Schenley's also examined the books?

Mr. La Shelle: Just a moment, your Honor, we object to the form of that question as leading, not cross-examination. This is counsel's own witness, his own client.

The Referee: You may answer. Overruled.

Mr. Fisk: What do you mean—his own witness? You put him on.

The Referee: Do you recall Mr. Walsh's question?

A. I recall it but I don't believe I can answer

(Testimony of Charles W. Ebnother.)

it because his question was if a certified public accounting firm representing Schenley——

Q. Well, I'll put my question this way. Was there any representative of a certified public account firm from San Francisco on the Hedgeside premises with you?

A. I don't recall that there was. I was trying to—Mr. Johnson himself is a certified public accountant but he is a [1259] direct employee of Schenley's.

Q. No, I am speaking about a certified public accountant other than Mr. Johnson.

A. Well, I don't remember any, Mr. Walsh. If you think it was a particular firm and would give me the name, I could tell you very quickly, but I don't recall.

Q. I have reference to a certified public accountant named Johnson, other than the Johnson that testified as a witness here. A. No.

Q. You don't recall him being on the premises examining the books?

A. Johnson? No. Offhand I do not.

Mr. Walsh: No further questions.

The Referee: Mr. Fisk?

Re-Cross-Examination

By Mr. Fisk: Q. Do you recall, Mr. Ebnother, which of those seven books of this pile that you have said were in my Buick?

A. No, I do not, Mr. Fisk.

(Testimony of Charles W. Ebnother.)

Q. Do you recall the circumstances under which they got there?

A. I'm not even positive that they were there.

Q. Do you recall turning these seven books over to Mr. Johnson representing the Schenley Company, in this courtroom and permitting him to go into another room and examine them for a period of a half day or more. Do you recall that?

A. No, I do not.

Q. You were not present when he did that?

A. Well, I don't recall it if I was.

Q. I think the record will show that they were turned over, your Honor, in this courtroom for over a half a day. Now, the four or five warehouse receipts that you have referred to that were placed in these books, all you recall is that they were original warehouse receipts, is that right? Strike that. You do recall they were original warehouse receipts? A. Yes.

Q. You don't recall the number.

A. I do not.

Q. Or the date. A. No.

Q. Or the books involved? A. No.

Q. Or the books that they went in?

A. No.

Q. Were there any on the occasion when Mr. Johnson of the Schenley Company went up and examined these warehouse receipts? Were you with him the entire time that he was examining these books?

A. Yes, practically the entire time. Might be for

(Testimony of Charles W. Ebnother.)

a minute or two I stepped out in the other room or something like that, but practically with him the entire time.

Q. Now, were there any documents replaced in the books at that time by anyone?

A. Well, to re-state the thing in my words, Mr. Fisk, there have been no material changes in those books at any time that I know of.

Q. That isn't my question. Would you read the question back to him, Miss Reporter? [1261]

(The last question was read by the Reporter.)

A. I don't know.

Q. At that time, did you permit Mr. Johnson to go through any of the files of the bankrupt at that time? A. No.

The Referee: What is the answer, Mr. Ebnother?

The Witness: No.

Mr. Fisk: I think that's all.

By the Referee: Q. Mr. Ebnother, in answer to a question by Mr. Walsh, you said that the first time that Mr. Johnson went to the Hedgeside plant at Napa, you sat on one side of the table and called out the warehouse receipt information and he sat on the other side and made his notes, is that correct? A. That's correct.

Q. I don't believe you finished. Was there another time that he went up there to examine other than you said the first time he went there?

A. Well, he was there several times during the course of time. The first time was when he went up

(Testimony of Charles W. Ebnother.)

there in response to the—that is, in compliance with your permission to make an audit of what was in the warehouse and this work was done in connection with that.

Q. Now, did he go up there and meet with you at any other time with reference to the warehouse receipts or warehouse receipt books when you permitted him to get other information—just [1262] pertaining to the warehouse receipt books?

A. I would say no.

Q. And you also stated that there had been no material changes and when you located the loose warehouse receipts, you didn't consider that they were important, is that right?

A. That's correct.

Q. What led you to that conclusion?

A. Well, there have been missing from the receipt books and from the files, so far as we have been able to tell, a large number of receipts. Presumably, they're cancelled because they have never turned up in the hands of anybody else as a claimant but we do not have the originals back.

Q. Now, when you located these few warehouse receipts, you stated that you didn't consider that they were important. Now, how did you arrive at that conclusion?

A. I think I can answer that in this way, your Honor. They did not apply to any of the receipts claimed by Schenley or any other outside concern, nor did they apply to material which Hedgeside itself owned which was not pledged.

(Testimony of Charles W. Ebnother.)

Q. You know that now? A. Yes.

Q. And you knew it then.

A. And I knew it then.

Q. Did they apply to the Anglo Bank as far as anything on their face is concerned regardless of other information that you don't know about—just as far as the face of the receipt?

A. I don't believe they did. I don't believe they did.

The Referee: Anything further, gentlemen?

Mr. Fisk: No.

Mr. Walsh: No further questions, your Honor.

The Referee: Thank you, Mr. Ebnother. Subject to your previous qualification, Mr. La Shelle, can I tell Mr. Ebnother he is in the clear?

Mr. La Shelle: Yes, sir, and except that I haven't left any loose strings that I will need to button up.

The Referee: As far as the respondents are concerned, they still reserve the right to call him as their own witness, should they desire. Thank you, Mr. Ebnother. * * * * * [1264]

ELOUISE JONES

recalled as a witness by the Petitioner, having been previously sworn, testified further as follows:

Direct Examination

By Mr. La Shelle: Q. Miss Jones, referring to these two exhibits, numbers 64 and 65 and the contents thereof, you are familiar with these, are you? A. Yes, sir.

(Testimony of Elouise Jones.)

Q. Did you find those? A. Yes, I did.

Q. Where did you find them?

A. 900 Battery Street.

Q. Whereabouts—What is 900 Battery Street—what premises?

A. That is the whiskey production plant of Schenley Distillers—Schenley itself.

Q. And whereabouts did you find those?

A. In the basement.

Q. I don't mean what part of the building—what part of the company? [1281]

A. The plant manager's office had various files stored there.

Q. What I mean is what part—sales, advertising—

A. Production.

Q. Now, referring to these various drafts appearing in both files, have you reviewed those generally?

A. Yes.

Q. And are those the drafts which you picked up along with the other documents from the Anglo Bank that you testified about the other day?

A. They are.

Q. And with reference to these other printed forms here that there are throughout the two folders of the exhibits in question, one is a printed form called "Request for Check" which has typing on it, the other one is what appears to be a mimeographed form under the title or caption "Schenley Affiliates, To All Concerned, from W. E. Manheim," are the first two top writings on it for the purpose of identification and they have

(Testimony of Elouise Jones.)

various typings filled in. Did you prepare those two documents? A. I did.

Mr. Fisk: Your Honor, there are two voluminous documents counsel has just shown me and as the Court knows, I have made a casual glance through them. If he is going to examine this witness on each of these documents, I submit that I am entitled to review the entire file in detail before he goes through so that we can make objections to the questions to the witness.

Mr. La Shelle: She stated she reviewed that generally, [1282] that she prepared a request and I am asking her if those are the documents which she prepared and she said yes.

The Referee: We will have a recess.

Mr. La Shelle: The rest of it is cross-examination.

The Referee: Just a minute, we will have a recess for ten minutes and during the recess, Mr. Fisk will have an opportunity to examine the two exhibits that have been marked for identification and then when you carry on with your examination after that, Mr. Fisk will have an opportunity to make whatever objections he thinks will apply. Is that what you are asking for?

Mr. Fisk: That's right. I think counsel is entitled to look at a document before a witness is interrogated on it.

(A ten-minute recess was taken.)

Mr. La Shelle: I have no more questions.

The Referee: Mr. La Shelle, did I understand

(Testimony of Elouise Jones.)

you correctly? What was that statement? Did you say you have no more questions?

Mr. La Shelle: Of this witness, no.

(Discussion off the record.)

Cross-Examination

(The last question and answer were read by the Reporter.)

By Mr. Fisk: Q. Miss Jones, what did you say that were in Schenley [1283] at the present time? A. Cashier. At the present time?

Q. Yes.

A. I didn't state before. At the time that these were made I told the Court.

Q. But what department are you in at present?

A. At the present time I am secretary to the general sales manager of the Roma Wine Division.

Q. Now, how long have you been with the Roma Wine Division?

A. Since a year ago last September.

Q. That was September, '48? A. Yes.

Q. With the Roma Wine Division, is that right?

A. That's right.

Q. Now, immediately prior to September, '48, where were you?

A. I was assistant to Mr. Manheim, who was head of the cashier, contract and disbursement departments and he was office manager. I was his assistant.

Q. And how long were you Mr. Manheim's assistant? A. About two years.

(Testimony of Elouise Jones.)

Q. So that from September, '46 to September, '48, you were in the cashier contract department as assistant to Mr. Manheim. A. Yes.

Q. Since September, '48, you have been with the Roma Wine Division at Fresno.

A. No, in San Francisco.

Q. In San Francisco. Now, I believe that you stated in your direct testimony that you personally located these documents [1284] in Petitioner's 64 and 65 for Identification, is that right?

A. Yes.

Q. Now, when did you locate those documents?

A. I guess it was yesterday morning—Wednesday morning. Wait a minute. Were we here Monday?

Mr. Johnson: Tuesday morning.

The Witness: It was Tuesday morning.

The Referee: Just a minute, Mr. Fisk, so we will be in the clear.

The Witness: It was the morning after—

The Referee: Elouise Jones was sworn and examined on March 27, which was Monday of this week.

The Witness: Yes. I located them March 28.

The Referee: When?

The Witness: March 28 I located them.

The Referee: Which was Tuesday.

The Witness: Yes.

Q. Tuesday morning. In other words, you were in the courtroom here on Monday, March 27.

A. Yes.

(Testimony of Elouise Jones.)

Q. And the next morning you located these documents, is that right? A. Yes.

Q. Do you remember about what time?

A. Oh, it was between 10 and 11 — probably around 10:30.

Q. Tuesday morning.

A. Yes.

Q. What time did you go to work Tuesday morning? A. Nine. [1285]

Q. Nine o'clock?

A. (Witness nods affirmatively.)

Q. Now——

The Referee: Pardon me, when you say—I don't know the materiality, but when you say going to work, that's the time that you arrive at your work.

The Witness: Yes, nine o'clock.

Q. Were you in the courtroom here Monday afternoon? A. Yes, sir.

Q. And you heard Mr. Johnson testify?

A. Yes, sir.

Q. You heard his testimony with respect to his inability to locate these sight drafts?

A. Yes, sir.

Q. Now, from that time until Tuesday morning at 10:30 when you located these documents, did you discuss the matter further with Mr. Johnson?

A. Yes.

Q. When did you first discuss the matter with him after you left the courtroom on Monday afternoon?

A. On the way back to San Francisco.

(Testimony of Elouise Jones.)

Q. Well, now, did he ask you to look for these documents at that time?

A. He said that we would meet at Battery Street the next morning. However, it was impossible for him to be there, and both of us were going to do it, so his assistant was there with me.

Q. Did he give you any ideas of how you should go about looking for any of these documents?

A. After we left here, we went to Battery Street and saw Mr. J. B. Donnelly, who is head of all production and we received permission from him to go into his personal files, which are open only to his secretary and himself. So——

Q. Excuse me.

A. (Continuing) So he gave us that permission.

Q. Mr. Donnelly.

A. Yes.

Q. And these documents you located on Tuesday morning at 10:30 in Mr. Donnelly's personal files. A. That's right.

Q. Now, did Mr. Johnson suggest you go to Mr. Donnelly for the purpose of locating these files?

A. Yes, that was one of the places we were going to start.

Q. Well, did he suggest that?

A. He suggested it, yes.

Q. And when did he suggest it first?

A. On the way to San Francisco.

Q. Monday afternoon. Now, is that the first time that Mr. Johnson ever mentioned the subject of these documents to you? A. No.

(Testimony of Elouise Jones.)

Q. When did he first bring that subject up to you?

A. I really don't remember, it's been so many and so long ago—so many times and so long ago.

Q. Well, can you tell—

A. No, I think it was probably when this court first went in session. I'm not sure. I couldn't be certain of anything. [1287]

By the Referee: Q. Pardon me, Miss Jones, when you say "this court first went in session"—

A. When this case.

Q. You mean with reference to the Hedgeside?

A. Yes.

By Mr. Fisk: Q. Do you know when this action commenced with reference to Hedgeside?

A. Well, to the best of my knowledge, I think it was sometime last fall. I couldn't be sure of the date or the month. I know it was before Christmas.

Q. When did Mr. Johnson first come to you and ask you where he might locate these sight drafts?

A. I couldn't give you the exact month on that. I know it was a long time ago.

Q. Then when did he come to you the next time after the first time?

A. I couldn't say. I know it was **many times**.

Q. He came to you many times.

A. Yes.

Q. And what did you do each time in an effort to find these documents?

A. We would discuss it and try to think of vari-

(Testimony of Elouise Jones.)

ous places that there was a possibility that we might find them or he might find them.

Q. You made suggestions to him as to where he might find [1288] them? A. Yes.

Q. Did you make any personal effort yourself to find them? A. No.

Q. You just suggested where they might be.

A. I didn't make any personal effort.

Q. And did you suggest that he possibly could find them in Mr. Donnelly's personal files?

A. I had no knowledge of Mr. Donnelly's personal files.

Q. Now; in the regular course of business of Schenley in this division out here, do you find documents of this kind in Mr. Schenley's personal files?

The Referee: Mr. whose?

Q. Mr. Donnelly's. Is that the regular practice?

A. I find that a very hard question to answer because of circumstances at the time. The reason they were there was because our department had been broken up and divided—the wine and the whiskey division—a year ago last September. There was not a department for the whiskey division here in San Francisco so all of the legal and confidential files went to Mr. Donnelly as there was really no other place for them to go, rather than send them to New York.

Q. And when did you learn that fact first?

A. I have known that all the time.

Q. But you never previously suggested to Mr. Johnson that they might be found there.

(Testimony of Elouise Jones.)

A. We all knew that they were given to him. What he did [1289] with them, we didn't know.

Q. And had you previously, previous to Monday afternoon, suggested to Mr. Johnson that these documents might be found in Mr. Donnelly's personal files? A. Yes, sir.

Q. But you made no effort to look for them there yourself. A. No.

Q. And you don't know what effort he made. A. No.

Q. Did Mr. Johnson, after you suggested that, return to you and say that he had made that investigation and had been unable to find them there?

A. He stated that he had looked at all the files that were made available to him.

Q. When you returned on Monday afternoon, you didn't telephone New York?

A. No, I didn't.

Mr. La Shelle: I might point out that when we returned——

Mr. Fisk: Just a minute, I submit I am entitled to——

The Referee: Mr. La Shelle, I'll permit you to go further. I think we're getting along very well here. Mr. Fisk is just asking the witness what she did and what she didn't do.

Mr. La Shelle: But let's be fair. The New York office is three hours' difference in time.

The Referee: Well, I don't think there is anything about Mr. Fisk's question that couldn't be

(Testimony of Elouise Jones.)

understood by the witness. If there is, why your witness can so [1290] designate.

(The last two questions and answers were read by the Reporter.)

Q. Do you know whether or not Mr. Johnson telephoned New York on Monday evening?

A. I do not know.

Q. Do you know whether or not he telephoned New York on Tuesday morning?

A. I do not know.

Q. He did not discuss that with you.

A. No.

Q. Now, when you located these documents in Mr. Donnelly's personal files, were all of the documents that appear in these two exhibits together?

A. No. Those documents, plus some other documents covering spirits already used which are not in question in the case, they were added to that, but those were all together, plus the others which are not in question.

Q. Well, now, let's take the sight drafts in these documents, in what state were they when you located them in Mr. Donnelly's personal files?

A. They were all just in that same order.

Q. In a file in this same order. A. Yes.

Q. They were not in these two particular folders, were they?

A. Well, what I mean in the same order, the sight draft and the request for check and the notation, those three documents for each set were together. Is that the way you—

(Testimony of Elouise Jones.)

The Referee: Pardon my interruption, Mr. Fisk. Let me see the—this is 65; what is the other one?

Mr. Fisk: 64.

By the Referee: Q. Miss Jones, take a look at the folder marked 64—the documents in 64. When you located the group of documents that are in Petitioner's No. 64 for Identification, were they in that folder that encompasses them now?

A. Not this particular one, no.

Q. Well, were they bound together in any form like they are now?

A. Yes, they were bound together——

Q. I mean, all of the documents that are inside of that folder now, were they bound together, exclusive of the folder, when you found them or when someone else found them?

A. No, they were all bound together in these folders right here (indicating).

Q. What do you mean "right here"?

A. In these folders (indicating). They were in these folders — not with the documents in those folders.

Mr. La Shelle: I might say, I should—I explained to counsel; perhaps I overlooked explaining to you, but these are the folders that were found and remaining in these folders are similar documents, but these cover spirits which have been used and withdrawn from the warehouse and, therefore, are not in question in this case. Since finding them, they took them out and segregated those that have been used but which are still here, and the ones that are in question, which are the exhibits.

(Testimony of Elouise Jones.)

Q. Well, that's what I'm trying to get. So the documents that are in Petitioner's No. 64 and Petitioner's No. 65 for Identification, when they were located, they were in other folders and not in the present form, is that correct, Miss Jones?

A. Yes, correct.

The Referee: You may proceed, Mr. Fisk.

By Mr. Fisk: Q. Did you remove them from the other folders and place them together in those folders or did someone else do that?

A. I did not do it.

Q. Now, how did you go about determining what documents you were looking for? You said you went over and did it alone, didn't you?

A. Well, I had Mr. Donnelly's secretary and Mr. Johnson's assistant go over with me. However, I made the actual identification of them.

Q. Well, now, let's take Petitioner's Exhibit 64 for Identification. Let's take first, the document on top which purports to be a sight draft of the Anglo Bank, dated November 10, 19 something, \$1530.24. How did you know that that was the document you were looking for at that time?

A. I knew because I have worked with the folders for months and months, plus the fact that I recognized my handwriting on the forms.

Q. Well, aren't there similar documents in these other two files that have all of those characteristics?

A. Yes. [1293]

Q. Well, how did you know that this particular document was the one you were looking for?

(Testimony of Elouise Jones.)

Mr. La Shelle: Well, just a moment, I'll object to that question as not proper cross-examination. She stated that when she got them, it was in this folder and that folder and someone else other than her segregated them.

The Referee: Overruled.

Mr. Fisk: I think the witness understands the question all right.

The Referee: Miss Jones, did you understand the question? Would you like to have it read again?

The Witness: I would like to have it read again, please.

(The last question was read by the Reporter.)

A. All of the documents were together and they had been together from the beginning of this deal.

Q. You mean, that all of the sight drafts that were issued by Franciscan and Hedgeside were always kept together in the same file, is that correct?

A. That's right.

Q. Therefore, you simply located the file that you had in mind, is that right?

A. That's right, I located the file and checked to see that the sight drafts were still in it.

Q. But you have no idea which sight drafts are in controversy in this case and which are not, have you?

A. I couldn't tell you if this one was unless I checked with [1294] some schedules.

Q. That's what I say, you don't have enough familiarity——

A. I can't remember.

(Testimony of Elouise Jones.)

Q. Well, have you assembled documents for this case in the past?

A. Not for this case. I only worked with it during the time the contract was in force.

Q. Now, in Petitioner's 64, the second document from the top, under the sight draft, is headed "Request for Check" and that purports to be a copy of an original, does it not? A. Yes.

Q. How many copies are made out when that request for check is made out?

A. I don't remember for sure, but I think there were three or four; I can't be positive.

Q. Did you make them out?

A. Yes, I did.

Q. You typed them yourself? A. Yes.

Q. Now, I notice that copy is not signed. Is the original signed? A. Yes.

Q. And who would sign the original—you or Mr. Manheim?

A. He signed most of them. However, I would sign for him in some cases.

Q. Now, where did the original go?

A. It's probably in the accounts payable department. I don't know.

Q. Well, what was the course of business of Schenley at the [1295] time they were made out? What did you do with the original?

A. I sent the original and the duplicate to Mr. Baglin in the production department.

Q. The original and a duplicate? A. Yes.

(Testimony of Elouise Jones.)

Q. And do you know what Mr. Baglin did with the original? A. No.

Q. You don't know what the course of business or practice was in that regard.

A. I couldn't say for sure. I have an idea, but I couldn't say for sure.

Q. You don't know whether he filed the original away or not. A. I don't remember for sure.

Q. What do you do today?

A. I am secretary to the general sales manager—

Q. I mean, what is the practice of the company today with respect to the original?

A. I don't know; I'm not in that division.

Q. Now, the third document in this exhibit, Petitioner's 64, purports to be a mimeographed document, is that right? A. Yes.

Q. And did you also make that out?

A. Yes.

Q. What are the names down at the bottom?

A. These are names of department heads and interested parties.

Q. How many are there? A. Eleven.

Q. All of those company employees are officials—were they [1296] at that time? A. Yes.

Q. Did each one get a copy? A. Yes.

Q. And who got the original of that document?

A. In most cases, Mr. Abbott is his name, was first on the list.

Q. And where is he located?

A. I don't know.

(Testimony of Elouise Jones.)

Q. Where was he located then?

A. I think part of the time he was located at our Market Street office, but he could have been located at the Battery Street office, too.

Q. Were all of those eleven individuals at that time located in San Francisco? A. No.

Q. Several of them? A. Several.

Q. Several. And they would get copies in New York. A. Yes.

Q. Now, I notice in this mimeographed copy opposite the heading "file" is a column and there is a designation. Can you tell me what that designation is?

A. W-E-M stands for W. E. Manheim; 12-1 stands for the date of preparation; and 710.041 is the file—is my file number.

Q. Now, are either of these two files identifiable by that number?

A. We had so many folders on this one deal which the 710.041 was Hedgeside and Franciscan so I didn't label each one of them [1297] with the file number.

Q. Well, neither of these two files bear that number. A. No, they don't.

Q. Does Schenley have a file that would answer that description or bear that number?

A. I don't think those are any longer in existence. They don't use that filing system any longer.

Q. Now, when you were making out these documents, did you find the original warehouse receipt along with these other two documents?

(Testimony of Elouise Jones.)

A. No, sir.

Q. Strike that out. Did you find the cancelled sight draft along with those two documents?

A. They were always clipped together in this manner.

Q. By you. A. Yes.

Q. And filed where?

A. In one of those folders (indicating).

Q. Not filed in a file bearing that number.

A. No.

Q. Then so far as your work is concerned, that file number has no meaning, is that right?

A. Yes, it had meaning. We had another folder which would be correspondence filed. There was a tab on this side. We had another folder of correspondence that had the number on. These were filed behind it.

Q. Well, now, when Mr. Johnson first asked you about where he could locate these documents, did you not advise him that [1298] you had such a file, did you?

A. I advised him the files were in existence to the best of my knowledge, but whether they had been separated or what condition they were in or where they were, I didn't know for sure.

Q. When you made out this document here or request for check, where did you get the information—

A. I got that from the—

Q. Wait just a minute. (Continuing): —where did you get the information to make out that request?

(Testimony of Elouise Jones.)

A. I took that from the duplicate invoice which I obtained from the Anglo Bank.

Q. When you went over there?

A. When they told me that there was a sight draft and I went over and checked the warehouse receipt and the invoices to see that they agreed and checked the amount of the sight draft to the invoices, then took the duplicate invoice back to the office and prepared my request for check from that.

Q. Now, I notice this first request is marked "Approved, by James E. Woolsey." What department was he in at that time?

A. He's in the compliance department.

Q. And before you requested a check, you always had to get his approval, is that right?

A. Not always. I did on the first one—maybe the first two, I don't know. Just right at first I did.

Q. Now then, would you make out the check in payment of the [1299] sight draft?

A. The voucher check was made out by another department after they received the request for check.

Q. Signed by either you or Mr. Manheim.

A. Yes.

Q. So you didn't make out the check.

A. No.

Q. Then you received the check then and went over to the bank with the check, is that right?

A. The voucher check was returned to us for final processing and approval. Then it was signed

(Testimony of Elouise Jones.)

and I took it to the bank to pick up the sight draft and the original invoices and warehouse receipt.

Q. You took the voucher check. Did you take any other papers with you when you returned to the bank except the voucher check, to pick up these papers?

A. I took the duplicate invoice for my own check to see that it was the same as—I was going to pick up the same as I had checked previously.

Q. In the first instance, upon getting notice from the bank, you received a duplicate invoice; then when you went back with the voucher check, you took that duplicate invoice with you.

A. That's right.

Q. And that duplicate invoice, I take it, was always approved by some member of the Schenley organization, is that right? A. Yes.

Q. Before delivery to the bank.

A. Yes.

Mr. La Shelle: Don't nod your head. Say yes or no, [1300] because the reporter won't get the nod.

Q. Now, did you take any other documents with you to the bank other than the voucher check and the duplicate invoice? A. No.

Q. Nothing else. And you went to the bank, then you handed them the voucher check and you received what?

A. I received the cancelled sight draft, the original invoice and the warehouse receipts.

Q. That's all.

A. Receipt or receipts.

(Testimony of Elouise Jones.)

Q. I didn't get the last three words.

A. Sometimes there was only one warehouse receipt; sometimes there were many.

Q. Oh. So you delivered your check to the bank, your voucher check to the bank and you received cancelled sight draft, the original invoice, the warehouse receipt, and did you receive anything else?

The Referee: She said receipt or receipts.

Q. Yes, the warehouse receipt or warehouse receipts. A. That's right.

Q. And that's all? A. That's all.

Q. You gave them no verbal instructions of any kind or character. A. No.

Mr. La Shelle: By "them," you mean the bank?

Mr. Fisk: That's right.

The Witness: No.

Q. The information that appears on the voucher check was [1301] obtained from you, that is, from your request for check, was it not?

A. That's right.

Q. And you, in turn, received it from the copy of the invoice. A. That's correct.

Q. In connection with the taking up of these sight draft transactions from the Anglo Bank that you have been testifying about, was there any other investigation of any kind made by Schenley in determining whether or not you would deliver a check against this sight draft?

Mr. La Shelle: Just a moment, your Honor, we will object to the form of that question because it's

(Testimony of Elouise Jones.)

obviously asking her for information beyond her knowledge.

Mr. Fisk: Well, what you know of.

Mr. La Shelle: She can say what she sid.

Q. Was there any other investigation that you know?

The Referee: That she knows of. You may answer—that you know of.

A. Not that I know of.

Q. I notice that some of these sight drafts have a rubber stamp number on them. Do you know what that number is?

A. No, I don't know.

Q. For example, in the third sight draft in this Petitioner's 64, which is dated November—

Mr. La Shelle: Give the amount of it.

Q. Which is dated November 13 (and I can't see the year number)— [1302]

Mr. La Shelle: It would have to be 1947.

Mr. Fisk: I'll handle it. You correct me if I do wrong.

Mr. La Shelle: It says 1947 there on the cancelled—

Mr. Fisk: It isn't dated so you can see it, though. You can't tell the year date, but it's probably 1947.

Q. The amount of it is \$676.06 and it's marked "paid November 18, 1947." Now, there is a rubber stamp number on the sight draft—No. 84264. I ask you if you know what that number is?

Mr. La Shelle: We will object to the form of that question as including counsel's conclusion that it's a rubber stamp number.

(Testimony of Elouise Jones.)

The Referee: You may answer, Miss Jones. Overruled. A. I do not know.

Mr. Fisk: The record speaks for itself. If I am wrong, it will probe it better than you can.

Mr. La Shelle: I am catching your tactics like a fellow does the measles.

Mr. Fisk: I wouldn't say you were doing quite as fast as that.

Mr. La Shelle: No, I just have German measles.

Q. You don't know who put the stamp on there?

A. I don't know, no.

Q. It means nothing.

A. It means nothing to me. [1303]

Q. Miss Jones, I notice in reviewing some of these requests for checks in this exhibit 64, there appears on there "approved by W. Del Tredici." Was it your practice to obtain his approval before giving out a check throughout the period in which some of these sight drafts were taken up?

A. It was imperative that Mr. Del Tredici approve—have his signature on the invoices before they were paid.

Q. And you have just copied that statement off.

A. That's right.

Q. I want to show you Petitioner's 51, Invoice No. 197, dated November 10, 1947—

Mr. La Shelle: Is that your copy, Mr. Fisk?

Mr. Fisk: Yes.

Mr. La Shelle: I prefer you use the Court's copy.

Mr. Fisk: All right. You furnish me with it.

(Testimony of Elouise Jones.)

Q. (Continuing): Invoice No. 197, dated November 10, '47 on the invoice of Franciscan Farm & Livestock Co., can you recall whether or not you took up the sight draft covering that particular invoice?

A. I cannot recall for sure.

Q. Looking at Petitioner's Exhibit 64, the top sight draft can you tell me whether or not that refreshes your recollection as to whether or not you ever saw that invoice?

A. I think probably I did.

Q. On the request for check in Petitioner's 64 under this sight draft, there is in pencil figures 197. Is that your handwriting?

A. Yes, it is. That's what makes me think that— [1304]

The Referee: I didn't hear the last of your answer.

A. (Continuing): Yes, it is. That is why I think probably I did see it.

Q. And what is the number of this invoice I have asked you about? A. 197.

Q. So you probably did see the original of this invoice. A. Yes.

Q. This is a photostat of it, is that right?

A. Yes.

Q. Now, on the invoice 197, down at the bottom, there appears a statement, "43 Schenley barrels, warehouse receipt, Mountain View No. 49 S-D through Anglo California National Bank, San Francisco, California; this account is assigned to Hedge-

(Testimony of Elouise Jones.)

side Distillery Corp. for collection; copies of this invoice in duplicate to Mr. Baglin." Can you say whether or not that was typewritten on the invoice at the time you saw it in the hands of the bank?

A. I can't say for sure that this was. I know there was some typing on most of them or some of them but I can't say whether it was exactly the same typing.

Q. Before issuing a check or request for check, would you consult Mr. Baglin?

A. No, not before issuing a request for check.

Q. That was not your practice in connection with these transactions.

A. No. As soon as I made up the request for check, I sent [1305] it to Mr. Baglin for his approval.

Q. Would the typewritten statement that I have just read in any way influence or affect you in making out your request for check?

A. I don't recall whether it did or not.

Q. Well, would it be your best recollection that it did or that it did not?

A. I can't answer that because I don't remember whether this was on all of the checks or not.

Q. You mean on all of the invoices.

A. Invoices, yes.

Q. At any rate, at the present time you have no recollection of any influence it had upon you in making out the request for check.

A. We had this procedure——

Mr. La Shelle: Just answer the question.

(Testimony of Elouise Jones.)

A. I can't answer—or I would like to have you read it. Would you read the question again?

(The last question was read by the Reporter.)

A. I don't think so.

Q. Now, I'm still referring to Petitioner's 51 in Evidence and the group of papers in that exhibit attached to the warehouse receipt, or the invoice just referred to, that is, Franciscan's invoice No. 197 and I show you what purports to be warehouse receipt of Hedgeside Distiller No. 3674-B, dated December 8, 1948, and ask you if you recall receiving that warehouse receipt when you took up the sight draft of November [1306] 10, 1947, included in Petitioner's 64. I might say, Miss Jones, out of fairness to you, the date of that warehouse receipt is December 8, 1948; that is the date shown on the receipt itself.

A. Did I understand the question correctly that this——

Mr. Fisk: Read it back.

(The last question was read by the Reporter.)

A. I couldn't say for sure.

Q. Well, now, looking again at Petitioner's 64 and the mimeographed sheet that accompanies the sight draft of November 10, 1947, does that refresh your recollection as to whether or not you received the Hedgeside Distillery Warehouse Receipt 3674-B at the time you took up that sight draft?

A. As shown here, I didn't.

The Referee: What is that, Miss Jones?

(Testimony of Elouise Jones.)

A. As shown here, it clearly states warehouse receipt No. 49; he has warehouse receipt 3674.

The Referee: Well, what was your answer before? You said as shown here it clearly what?

The Witness: I said it clearly shows that they don't work together.

Q. In other words, from your records, you would say that you did not receive this warehouse receipt 3674-B when you took up that sight draft.

A. Not right at the same time.

Q. Well, do you have any recollection of ever receiving this warehouse receipt 3674-B—you personally? [1307]

A. Not offhand. I would have to look at some records.

The Referee: What was that again?

The Witness: Not offhand.

The Referee: And what was the last part of your answer?

The Witness: I would have to look at some of the records of schedules.

Q. Now, do you have any recollection of receiving, at the time of taking up that sight draft, warehouse receipt No. 49, Franciscan Farm & Livestock Co.?

A. This sight draft dated November 10 covered warehouse receipt No. 49 dated November 10, 1947, Franciscan Farm & Livestock.

Q. Now, then, if you received that warehouse receipt—you did receive a warehouse receipt at the time you paid your check to the bank and took over

(Testimony of Elouise Jones.)

that sight draft, did you not? A. Yes.

Q. Now, what did you do with the warehouse receipt when you went back to Schenley's offices?

A. I put it in a safe—locked safe.

Q. And then was it your practice at that time to just hold that warehouse receipt there?

A. Yes.

Q. And did you hold it ad infinitum or what did you finally do with it?

A. I held them until I received instructions to release them to designated people. [1308]

Q. And do you have any recollection as to what instructions you received with this warehouse receipt 49 of Franciscan? A. No.

Q. Do you have any recollection what you did with any of the warehouse receipts received in payment of the sight drafts appearing in that exhibit, Petitioner's 64?

A. Some of them were released to Mr. Peck of our company.

Q. And what is his title and where is he located?

A. I don't remember what his title is or was but he's located at 900 Battery Street.

Q. In other words, you physically delivered some of these warehouse receipts to Mr. Peck?

A. They were transmitted to him.

Q. Well, by transmitted, you are distinguishing from personal delivery by you, is that right?

A. That's right.

Q. And you don't know what he did with them, I take it? A. No.

(Testimony of Elouise Jones.)

Q. You have never seen them since that time.

A. No.

Q. When you went over with your check and delivered it to the bank in payment of the sight draft, did you make any examination of the warehouse receipt that they had there? A. I did.

Q. What examination did you make?

A. I checked to see that the serial numbers, gallonage and date were in accordance with the invoice which we were paying, or [1309] invoices which we were paying.

Mr. Fisk: That's all.

The Referee: Mr. Walsh?

Mr. Walsh: No questions, your Honor.

The Referee: Mr. La Shelle?

Mr. La Shelle: Yes, I just have a couple of questions.

Redirect Examination

By Mr. La Shelle: Q. Did any of the invoices that you remember picking up come through without Mr. Del Tredici's written approval on them?

A. Yes.

Q. When that happened, what would you do?

A. I would go through the same procedure with the exception that payment would be withheld until written approval was received from Mr. Del Tredici.

Q. Now, with reference to the warehouse receipts, as distinguished from invoices and drafts which you picked up during this period of time,

(Testimony of Elouise Jones.)

were they all Hedgeside warehouse receipts or were they some other receipts?

A. They were both Hedgeside and Mountain View receipts.

Q. And with reference to this invoice that counsel was asking you about where it says 43 Schenley barrels, warehouse receipt, Mountain View No. 49, checking that against the warehouse receipt of Hedgeside, does that refresh your recollection as to whether Mountain View or Hedgeside received a copy of that invoice?

A. Mountain View did receive——

Mr. Fisk: She said she didn't; if she wants to change [1310] her testimony——

Mr. La Shelle: Let's be fair to this witness. It's already in this case that originally, Mountain View receipts were issued and later substituted by Hedgeside. That's not cross-examination. It's trying to trick a witness; that's what it is.

Mr. Fisk: Don't worry about me tricking a witness when you are standing here to testify for me.

Mr. La Shelle: You will try, but you won't.

The Referee: Will you read Mr. La Shelle's question and afford the respondents an opportunity to make an objection?

Mr. La Shelle: That's all the questions I have. I have no further questions.

(The last question was read by the Reporter.)

Mr. Fisk: The record will show what——

The Witness: She read it back as invoice. Did you say invoice or receipt?

(Testimony of Elouise Jones.)

Mr. La Shelle: Receipt.

The Referee: What is your statement, for my benefit? I mean, so the record will be straight with reference to receipts, invoices and so forth—the way the court reporter read it back, is that the way you would like it to appear in the record?

The Witness: Well, she said one thing and I thought he had said another. [1311]

The Referee: The only way I want is the way you are answering it.

The Witness: She said invoice and I thought he said receipt.

The Referee: Well, then, you now tell the court reporter the way you want your answer to go into the record.

Mr. La Shelle: She is not referring to the answer; she is referring to something I said.

The Witness: It wasn't my answer; it was the way she read back what he said.

The Referee: The only way she——

The Witness: I understood him to say receipt and she read it back invoice.

The Referee: And Mr. La Shelle, what did you say?

Mr. La Shelle: Receipt.

The Witness: That's the way my answer was.

The Referee (To the Reporter): You will make the correction to receipt.

Mr. Fisk: What is the witness's answer? I don't know what the question is or the answer.

(Testimony of Elouise Jones.)

The Referee: Mr. La Shelle said that he was satisfied and the Court, in the face of your comments and the Court's state of mind, the Court is not satisfied.

Mr. La Shelle: There is a question and there is an answer. There is no motion or no objection. There is [1312] nothing except discussion of counsel.

The Referee: That's the reason the Court has not made any ruling; it was merely a comment.

Mr. Fisk: May I have the question and the answer read as it now is in the record?

(The Reporter read the last question and answer and discussion of counsel following.)

The Referee: So now we are back to Mr. La Shelle's original question.

Mr. Fisk: I take it we are through.

(Discussion off the record.)

Recross-Examination

By Mr. Fisk: Q. Miss Jones, will you look at the Franciscan invoice No. 197 dated November 10, 1947?

Mr. La Shelle: Will you talk a little louder, Mr. Fisk, so we can hear you?

Q. Will you look at Franciscan invoice No. 197 dated November 10, 1947 and tell me whether or not there is anything in that invoice that refreshes your recollection as to what warehouse receipt you received when you took up the sight draft accompanying that invoice?

The Referee: Is there an exhibit—

(Testimony of Elouise Jones.)

Q. Is there anything in that document that refreshes your recollection as to what warehouse receipt you received? Not what some other document refreshes your recollection, but is there anything in that document that refreshes your recollection?

Mr. La Shelle: Before you answer, I ask you to read the entire document. Don't just glance at it; read it.

A. Warehouse receipt, Mountain View No. 49 was attached to invoice No. 197, dated November 10, 1947.

Mr. La Shelle: Well, is your recollection refreshed now from looking at that document as to what warehouse receipt, if any, you received?

Q. When you took up that invoice and sight draft.

A. At the time that I took up the sight draft, warehouse receipt No. 49, Mountain View, accompanied it.

Q. You took that warehouse receipt back to Schenley's offices and held it awhile and then turned it over to Mr. Peck, is that right?

A. I don't remember whether I turned it over to Mr. Peck or not.

Q. If you did not turn it over to Mr. Peck, whom would you have turned it over to?

A. It stayed there and was still there when I left and was transferred to another department.

Q. And as far as you know, it's still there.

A. I know it isn't there, but I don't know what happened to it.

(Testimony of Elouise Jones.)

Q. You know that it isn't there now.

A. No, because there is no office—there is no department.

Q. And you just don't know where the document is. [1314]

A. That's right, I don't know.

Mr. Fisk: That's all.

The Referee: Mr. Walsh?

Mr. Walsh: No questions.

The Referee: Mr. La Shelle?

Mr. La Shelle: No questions.

The Referee: May Miss Jones be excused now? Thank you very much, Miss Jones.

(An adjournment was taken until Wednesday, April 26, at 10:00 a.m.)

* * * * * [1315]

EUGENE BRANSTETTER

called as a witness on behalf of Petitioner, being first duly sworn by the Referee, testified as follows:

By the Referee: Q. Your full name?

A. Eugene Branstetter.

Q. How do you spell the last name?

A. B-r-a-n-s-t-e-t-t-e-r.

Direct Examination

By Mr. Ward: Q. What is your position, Mr. Branstetter?

A. Liquor control officer of the State of California.

Q. And what is your district?

(Testimony of Eugene Branstetter.)

A. Napa County.

Q. Napa County?

A. (Witness nods affirmatively.)

Q. And were you in the same job in 1949?

A. I was.

Q. Did you have occasion to visit the Hedgeside Distillery office in May of 1949? A. I did.

Q. And what was the purpose of that visit?

A. May 25 of 1949 I went out and picked up the licenses—state licenses issued to the Hedgeside plant at that time. [1339]

Q. Were you instructed to go there to pick them up? A. I was.

Q. And from whom did those instructions come?

A. Mr. Patterson in Woodland.

Q. And what was his position?

A. He was the liquor administrator of the 14th District.

Q. I show you Petitioner's Exhibit No. 60 for Identification which purports to be a license from the State of California on which the words "Public Warehouse License" are typed. Do you have any way of identifying this license as one of those you picked up?

A. Yes, by the number E95D, File No. 17400.

Q. And at the time you picked up that license, did you make a note of the license number and the serial number? A. Yes.

Q. And is that the method you were able to identify them now from those notes?

A. That's right.

(Testimony of Eugene Branstetter.)

Q. I show you Petitioner's Exhibit No. 61 for Identification, purporting to be a license issued by the State of California upon which is marked or is typed "Distilled Spirits Manufacturer's License". Can you identify this as a license you picked up on May 25, 1949?

A. Yes, that is one of them, K-23-D, Distilled Spirits Manufacturer's License, File 17400.

Q. And are those numbers the means by which you can identify this as a license you did pick up that day? [1340]

A. That's right.

Q. Do you recall where the licenses were when you picked them up physically?

A. In a—they were on a board on the wall, just inside the door.

Q. And did you take them off the board?

A. Yes.

Q. And what disposition did you make of these two licenses after you took them away?

A. Sent them to Mr. Patterson in Woodland.

Mr. Ward: Now, your Honor, we offer in evidence, Petitioner's Exhibit No. 60 and Petitioner's Exhibit No. 61.

Mr. La Shelle: We have to return those, so we would like to substitute photostats, your Honor.

The Referee: Formerly 60 for Identification, becomes 60 in Evidence.

Mr. Fisk: On behalf of the Bank, I make an objection that they are irrelevant, incompetent and immaterial, which was the objection I made before. These are the documents that I told counsel he

(Testimony of Eugene Branstetter.)

need not, as far as I was concerned, produce a witness to authenticate them, so I am making the same objection as to the introduction. One of them purports to be a State of California distilled spirits manufacturer's license of Hedgeside, and the other a State of California public [1341] warehouse license of Hedgeside.

The Referee: Mr. Walsh?

Mr. Walsh: I objected to these before, if your Honor please, and I raise the same objection, they are not material.

The Referee: The objection is overruled—60 becomes 60 in Evidence; 61 becomes 61 in Evidence.

Cross-Examination

By Mr. Fisk: Q. Mr. Branstetter, is that correct? A. That's right.

Q. Whom did you see at Hedgeside when you picked up these two licenses?

A. Mr. Logan and Mr. Soule—S-o-u-l-e, I believe his name is spelled.

Q. Mr. Logan and Mr. Soule. And did you obtain their permission to remove these documents or did you just take them without their permission?

A. I had an order to remove those documents.

Q. And you took them, regardless of their approval, is that right? A. That's right.

Q. These licenses had not expired at that time, had they? A. No, sir.

Q. In other words, tell me the occasion for removing them from the premises of Hedgeside.

(Testimony of Eugene Branstetter.)

A. I had an order of suspension for those licenses.

Q. That is, an order of the State Board of Equalization? [1342] A. That's right.

Q. Of the State of California.

A. That's correct.

Q. You are a representative of the State Board of Equalization, are you not?

A. That's right.

Q. For the State of California?

A. That's right.

Q. You have nothing whatsoever to do with any other state organization.

A. (Witness nods affirmatively.)

Q. And your duties are solely with the Alcohol Beverage Control exercised by the State Board of Equalization for California?

A. That's correct.

Q. Was the order of suspension a written order that you referred to?

A. Printed form that's filled in.

Q. Did you present that order to Mr. Logan or Mr. Soule?

A. I did. I tacked the order up on the board where I took the licenses from—the notice of suspension.

Q. Well, then, so far as you know, a copy of that order should be in the possession of Hedgeside, is that right?

A. A copy of that order was served on Hedgeside and put up in place of the licenses.

(Testimony of Eugene Branstetter.)

Q. And left with them? A. Left there.

Q. You did nothing, did you, that is, you personally had nothing to do with the issuance of these licenses? [1343] A. No.

Q. Did you have anything to do with the issuance of the order of suspension?

A. No, sir, not the issuance of it. I merely served it.

Q. Did you make any check on the situation as it existed at Hedgeside in connection with the issuance of that order?

A. In what way do you mean?

Q. Well, strike that out. Do you know the factual basis for the issuance of that order of suspension? A. Yes.

Q. What was it?

A. Non-payment of taxes—excise taxes.

Q. Non-payment of excise taxes to the—

A. State.

Q. What do you mean—the liquor control board of the state?

A. To the Board of Equalization.

Q. The State Board of Equalization.

A. That's right.

Q. And what is the particular act under which you operate?

A. The Alcohol Beverage Control Act.

Q. The Alcohol Beverage Control Act of the State of California. A. That's right.

Q. And due to the fact that Hedgeside had failed to pay the current taxes due under these licenses,

(Testimony of Eugene Branstetter.)

an order of suspension was issued and the licenses removed from the premises by you, is that right?

A. That's right. [1344]

Q. Since removing these licenses, have you returned to the premises of Hedgeside?

A. I have been out there, yes.

Q. Have you made any effort to determine what their activities and operations have been since these licenses were suspended?

A. No, I haven't.

The Referee: What is the answer?

The Witness: No.

Q. The State Board of Equalization is not in any sense concerned with that, is that correct?

A. As far as I know.

Mr. Fisk: Yes. That's all.

The Referee: Mr. Walsh.

Cross-Examination

By Mr. Walsh: Q. Mr. Branstetter, was there any demand made upon the Hedgeside Distillery for the taxes before the order of suspension was issued?

A. As to that I couldn't say right now.

Q. Well, is it customary for the department to take these licenses without notifying or making a demand upon the particular licensee to pay the delinquent taxes?

A. There is a section of the act that at any time they feel that they are in jeopardy, that they can summarily suspend those licenses.

Q. Isn't it a fact that they suspended those li-

(Testimony of Eugene Branstetter.)

censes because they knew an involuntary petition in bankruptcy was [1345] filed against the Hedgeside Distillery?

A. That order that I had was a non-payment.

Q. Well, did you know yourself that an involuntary petition in bankruptcy had been filed against the Hedgeside Distillery? A. I did.

Q. Did you know that at the time that you took the licenses?

A. Yes. Yes, I had notified my superiors of it.

Q. You had notified them. A. Yes, sir.

Q. And isn't it a fact that you notified them, that's when the order of suspension was issued?

A. It was issued for non-payment.

Q. Yes, but it was issued after you notified your superiors that the involuntary petition had been filed against Hedgeside Distillery. A. Yes.

Q. What is your answer?

A. Yes, it was afterwards.

Q. And when you were on the premises of the Hedgeside Distillery on May 23, you knew that an involuntary petition in bankruptcy had been filed.

A. Yes.

Q. And you stated that you knew that before and you notified your superiors.

A. I had notified my superiors that there was a bankruptcy proceedings; whether it was involuntary or voluntary, now I couldn't say.

Q. When did you notify them, if you remember?

A. It was sometime around this time. Now, just exactly [1346] when, I couldn't say.

Q. What do you mean "around this time"?

(Testimony of Eugene Branstetter.)

A. Around the time that I picked up these licenses.

Q. How did you notify your superiors—in writing or by telephone?

A. Offhand I couldn't say.

Q. You don't remember.

A. I don't remember.

Q. But anyway you knew, when you took the licenses, that there was a petition in bankruptcy filed against Hedgeside Distillery.

A. Yes.

Q. Did you have any order of any United States District Court to go upon the premises and take these licenses?

A. No.

Q. You didn't, did you?

A. No.

Mr. Walsh: No further questions.

Mr. Fisk: May I ask just one other question, if the Court please?

Cross-Examination—(Continued)

By Mr. Fisk: Q. Mr. Branstetter, preliminary to issuing these licenses by the State of California, was any determination made whether or not any of the pertinent federal laws were complied with?

Mr. Ward: We object to that. I can't see that that is proper cross-examination as to the federal laws.

The Referee: Overruled. You may answer.

The Witness: Please repeat that question?

(The last question was read by the Reporter.)

A. Previous to the issuance of these licenses, I wouldn't have any knowledge of it.

(Testimony of Eugene Branstetter.)

Q. I don't believe you understand my question. I'll reframe the question this way. Mr. Branstetter, as a condition of issuing these licenses, does the Board make a determination as to whether or not the licensee has complied with the pertinent federal laws?

Mr. Ward: Well, I object to that, your Honor, as calling for the witness's conclusion, depending on what the statutes of the state provide—

Mr. Fisk: I am referring to practice, your Honor.

The Referee: Overruled. You may answer.

A. Some types of licenses it is and—we do make an investigation of whether there is a basic—what we call a basic permit from the Internal Revenue Department. Other types of licenses we do not question.

Q. Well, this type of license here, do you make that determination?

A. That type of license? Right at this time, I couldn't tell you. I'd have to start to check up in the book and find out whether it's necessary on that. In the winery license, we do.

Q. But you can't say with respect to—

A. I couldn't say right now, no.

Q. Well, is such a determination made with respect to compliance with other California state licenses? [1348] A. No.

Mr. Fisk: That's all.

The Referee: Mr. Ward?

Mr. Ward: No further questions. * * * * * [1349]

HELEN HUSTED

called as a witness on behalf of the Petitioner, being first duly sworn by the Referee, testified as follows:

By the Referee: Q. Your name?

A. Mrs. Helen Husted, H-u-s-t-e-d.

Q. Mrs. Helen Husted, H-u-s-t-e-d. And where do you reside, Mrs. Husted?

A. 111 Stonecrest Drive, Napa, California.

Q. Where? A. Napa.

Q. Stonecrest Drive, Napa.

A. Yes, sir.

Q. And by whom are you employed?

A. No one at present.

Q. Unemployed. A. Right, sir.

The Referee: Very well, Mr. Ward or Mr. La Shelle.

Direct Examination

By Mr. La Shelle: Q. Mrs. Husted, between the years approximately '45 and '49, by whom were you employed? A. Hedgeside Distillery.

Q. And when did you start your employment and approximately what month and what year?

A. In May, 1945. [1455]

Q. And when did you terminate your employment there?

A. As of the close of business on March 31, 1949.

Q. And during that period with the exception of vacations, holidays and weekends and so forth, you were employed continuously?

A. Yes, sir.

Q. And during that period of time, were you

(Testimony of Helen Husted.)

employed by anyone else? A. Yes, sir.

Q. And whom?

A. Franciscan Farm & Livestock Company.

The Referee: I didn't hear that. What period were you employed by Franciscan?

A. The same period, with the exception—no, I better change that a little bit—to March 15, 1949 for Franciscan. You see, there's a fifteen-day differential there. I better put that in.

Q. And which one of those (I'll call them Hedgeside and Franciscan to make it shorter)—at which did you spend most of your time.

A. Hedgeside.

Q. And what was your general classification as an employee?

A. Well, I was the only stenographer, the only girl in the office during that period who was a stenographer as such and it included general stenographic and clerical duties.

Q. I take it, you were the only one that did shorthand. A. That's right.

Q. And during that period, among other duties, did you have charge of the warehouse receipt books for the IRBW No. 2 [1456] at Hedgeside?

A. I made out the warehouse receipt books—rather, the warehouse receipts on instructions and kept them in their file as such.

Q. I'll show you two groups of warehouse receipt books here, Mrs. Husted, 1, 2, 3, 4, and 5 in Evidence, No. 1 being a negotiable book and the others being non-negotiable, and in this group here,

(Testimony of Helen Husted.)

which is Petitioner's Exhibit for Identification 59—

The Referee: There are seven of them—59.

Q. (Continuing): 59 there are 7 non-negotiable books here. Would you just examine these books just briefly and state whether or not you recognize those as some of the warehouse receipt books that you worked on up there in your employment?

A. Yes, this is a negotiable warehouse receipt book.

The Referee: You are referring now to—

Mr. La Shelle: No. 1.

The Referee: Petitioner's Exhibit No. 1.

The Witness: No. 1.

The Referee: In Evidence.

The Witness: Uh-huh.

The Referee: Now, you might refer to 2, 3, 4, and 5.

The Witness: Well, 2, 3, 4, and 5 are all the same kind of—

The Referee: Look at them. [1457]

The Witness: Do you want me to look at them all?

The Referee: No, I want you to look at the four volumes.

The Witness: Yes, these are the non-negotiable warehouse receipt books.

The Referee: And now, Mr. La Shelle wants you to look at this group in Petitioner's No. 59, for Identification.

(Testimony of Helen Husted.)

Mr. La Shelle: Just run briefly through each one.

The Witness: Yes, these are the non-negotiable warehouse receipt books.

Q. As part of your duties, did you make out the warehouse receipts upon instructions?

A. Yes, sir.

Q. And who usually gave you those instructions?

A. Mr. McMains, generally.

Q. And what is his first name?

A. Walter—W. S. McMains.

Q. And in filling out the warehouse receipt, would you just tell the Court how you did it? I mean, the mechanics of it—what you did with the book before and after making the receipt?

A. Ordinarily, Mr. McMains supplied the information on a little rough draft, giving the number of the barrels and the type of goods and how many proof gallons are involved and if you notice, they're made out in triplicate and it was just up to me to date them and put the name of the owner of [1458] the goods on them and then describe the goods and then on the bottom of the receipt is a little section that has to do with the statement of the cost of the storage and that's all.

Q. In typing them up, did you use carbons?

A. Yes, sir.

Q. And how would you make that operation in typing? Would you take the copies out of the book or what?

A. You have to tear the copies out of the book

(Testimony of Helen Husted.)

because it's on a perforation and the little section on the end there has never been filled out so far as I know. So we had no use for it.

The Referee: You mean the stub?

The Witness: The stub, yes. We have never filled that out.

Q. I notice a lot of these, not most of them, have the copies put back with scotch tape.

A. That's right, sir. The point is that very seldom was there any purpose in having these as a file copy because we had no use for it.

Q. Well, I mean I take it the scotch tape was used because you tore it out to be typed.

A. That's right.

Q. And then you used the scotch tape to put them back. A. That's right.

Q. And apparently followed the same routine for putting in cancelled originals.

A. That's right.

Q. Now, where did you keep these warehouse receipt books? [1459]

A. These warehouse receipt books have been stored on a shelf in the vault.

Q. And where is the vault located?

A. It's just a little extra room off of the main office.

Q. Off of the main office. A. Yes.

Q. And during the——

The Referee: Pardon me, Mr. La Shelle. Main office of where. Where is the location?

(Testimony of Helen Husted.)

The Witness: Just outside of Napa—Monticello Road and Atlas Way, Napa.

The Referee: Whose place of business?

The Witness: Hedgeside.

Q. You are familiar with the general premises up there, are you? A. Yes, sir, very.

Q. That is the warehouse, the office and the distillery and the residence and so forth.

A. Yes, sir.

Q. Along the lines that the Judge just asked you, would you be good enough to take this pad and draft a rough sketch of how the buildings are?

Mr. Walsh: Just a minute, if your Honor please, I object to that as incompetent, irrelevant and immaterial, this witness drawing a diagram. The best evidence is the plat of the Hedgeside premises.

Mr. La Shelle: That's quite true, but this witness can draw an approximation as to how the setup is there, what offices there are and what buildings, that's [1460]—all—just to give the Judge an idea.

The Referee: Where is the plat, Mr. Walsh?

Mr. Walsh: Well, the plat can be produced any time. There is a plat attached to these applications for licenses. I think it's already in evidence, your Honor.

The Referee: That's what I'd like to know.

Mr. Walsh: I think it's already in evidence.

The Referee: Maybe it will save this witness doing some drawing here.

Mr. La Shelle: In the meantime, would you just draw it?

(Testimony of Helen Husted.)

Mr. Walsh: There is an application—the applications that were filed for the permits.

(Discussion off the record.)

Mr. Walsh: There is a plat available, if your Honor please.

Mr. La Shelle: The only thing I want to do is to show your Honor the premises. What I have in mind is just two warehouses, kind of in a line—this little building next to that is an office, this is the Hedgeside office and there is something else again. I want to show where that is in relation to the warehouses.

The Referee: You may proceed. Overruled.

The Witness: Well, this won't be very good but it will do the trick. This is a warehouse (indicating) [1461] and this is a warehouse (indicating)——

Mr. La Shelle: Just finish it and then you can explain it to the Judge.

The Witness: All right.

Mr. La Shelle: What you have drawn will show the whole Hedgeside premises.

The Witness: No, I didn't put the houses in.

Mr. La Shelle: What is the next number, Judge?

The Referee: The last exhibits were the minute books, 68-A, B and C. This will be 69 for Identification?

Mr. La Shelle: Will you just mark that 69 for Identification please, Judge?

The Referee: Petitioner's No. 69 for Identification is a pencilled drawing made by the witness of the various improvements and the road located on

(Testimony of Helen Husted.)

the Hedgeside Distillery property, is that correct?

The Witness: Yes, sir.

Mr. Fisk: May I take a look at it first, your Honor?

The Witness: That's very rough.

Mr. Walsh: You missed a few but it's all right.

The Witness: I don't have a tank in there and I know I haven't got the pump house and so forth.

Q. This little sketch that you have drawn here, as you look at it on the left there are two oblongs there with "WW" [1462] on each one.

A. Those are the warehouses.

Q. Those are the two warehouses.

A. Yes, sir.

Q. And by "those" you mean IRBW No. 2?

A. Yes, sir.

Q. In other words, both constitute IRBW No. 2.

A. Yes, sir.

Q. And the next building you have divided into three divisions. The lower right-hand part as you look at the map you have "OFF." Is that the office?

A. That is the office, that's right.

Q. And next to that you have "US."

A. That's the storekeeper gauger's office.

Q. That's the storekeeper gauger's office in the same building? A. Uh-huh.

Q. Then above that you have——

A. Rectifying.

Q. Rectifying.

A. Well, then I should have marked the under part there bottling.

(Testimony of Helen Husted.)

Q. Put that in there.

A. I can't show the second floor on that, either.

Q. That has two floors? A. Yes.

Q. You just show the bottom floor. What is the top floor?

A. The gin still.

Q. The gin still. [1463]

A. This is the roadway (indicating). You see, the roadway comes in from the main highway and you can go completely around and out around here (indicating) and get out, or you can come down the roadway and pass between the warehouse——

Mr. Walsh: Your Honor please, what is the materiality of this testimony?

The Referee: I'm sure I don't know, Mr. Walsh, but Mr. La Shelle has had this plot plan marked for identification. What is the materiality in this case?

Mr. La Shelle: Well, the materiality is this, your Honor. As the code states, that copy of the warehouse receipts are kept at the principal place of business of the company in the warehouse and then I just want to develop in the record exactly where these warehouse receipts were kept so that there won't be any confusion. Would you mind just stepping up here for a moment and showing——

Mr. Walsh: Your Honor, if that is Mr. La Shelle's purpose in having this plat drawn and introducing in evidence, then I'm going to renew my objection, if your Honor please, that the best evidence is a plat of the premises and the plant which

(Testimony of Helen Husted.)

is drawn to scale by somebody who is familiar with the entire workings of the plat.

The Referee: There is no offer of any document in evidence. [1464]

Mr. Walsh: Well, then, I object to this line of testimony on the grounds it is incompetent, irrelevant and immaterial.

The Referee: Well, certainly this witness is qualified to testify as to the physical setup of the place where she worked.

Mr. Walsh: Just where she worked and that's all. That's the office. Not of the distillery and the boiler room, the pump house, the gauger's office and the warehouses.

The Referee: Well, temporarily, before I decide that, what happened to the comment with reference to there being a plat attached to one of those documents.

Mr. Walsh: Well, the original is not here.

Mr. Fisk: There is a plat here but it's not a complete one.

The Referee: Does it indicate the office building and the warehouse?

Mr. Fisk: No, it just shows the two warehouses.

The Referee: Just the two warehouses.

Mr. Walsh: There is a plat in existence, your Honor.

Mr. Fisk: The one that's in evidence——

Mr. La Shelle: No, it doesn't show. It shows the interior of the warehouse.

Mr. Walsh: I can produce that. [1465]

(Testimony of Helen Husted.)

The Referee: Is there anything in evidence that indicates any more than the two warehouse buildings or is there any previously marked for identification along the lines that you have referred to, Mr. Walsh, as a plot plan that we have here?

Mr. Fisk: There was some description, but I don't remember any diagram. This is one I have. (Indicating).

The Referee: That doesn't help us very much.

Mr. Ward: As I recall, one of the witnesses has already testified as to where the office itself is located in relation to the two warehouses and the distillery and all the rest of that. It was simply testimony as to where the office was located.

The Referee: You may proceed. Overruled.

Q. In this little building here——

Mr. Walsh: What building do you have reference to?

Mr. La Shelle: Where the office is.

The Referee: What building do you have reference to?

Mr. La Shelle: The one that's marked "U.S. Government Gauger" in the lower right-hand corner of that.

Q. As you look at it, you have "OFF." Is that what you mean by the office?

A. That's the office space.

Q. And next to that is the U. S. Government Gauger's office? A. That is right.

Q. And to the left are two oblongs marked "WW" respectively. [1466]

(Testimony of Helen Husted.)

A. That's right.

Q. Those are warehouses constituting IRBW No. 2? A. That's right.

Q. Approximately how much space is there between the building where the office is and where the warehouse starts, roughly?

Mr. Walsh: Now, if your Honor please, I am going to object to that question as incompetent, irrelevant and immaterial.

The Referee: Overruled. How far is it?

The Witness: It's—

The Referee: Approximately.

A. The space of a truck and a half.

Q. And the rest of these buildings that you have denoted on here you have storage here on a building marked "storage." A. Yes.

Q. And then you have a building here marked "dist". What's that?

A. That's the distillery, but I haven't indicated the little gauger's office that's down there.

Q. Then you have "Stone house."

A. Yes.

Q. That's the residence.

A. That's the residence.

Q. Then you have "swimming pool."

A. Yes.

Q. That's a house (indicating)?

A. That's another residence. [1467]

Q. What's this (indicating)?

A. Laporì—that's the name of the man that owns that building.

(Testimony of Helen Husted.)

Q. And there's another place here called "McMains."

A. Yes, Mr. McMains used to own that house. He is no longer there.

Q. There's another place here called "barns."

A. Yes, those are horse barns.

Q. There's another place here marked "Logan."

A. That was where the Logan house is. You should have a disticraft location here too, approximately.

Q. Is that the disticraft place where they make the Silverado grape brandy? And then the lines that you have drawn around the warehouses and the building that houses the government gauger's office, the bottling room and the rectifying room, you have drawn a road running around there.

A. Uh-huh.

Q. And there was a vault off of this office where the warehouse receipt books were kept?

A. Yes.

Q. Would you sit down please?

Mr. La Shelle: We offer that in evidence as Petitioner's Exhibit next in order, your Honor.

Mr. Walsh: I am going to object to that offer in evidence, if your Honor please, as incompetent, irrelevant and immaterial and not the proper representation and not a correct drawing or plat of the [1468] Hedgeside premises.

Mr. La Shelle: Your Honor, it's not intended to be accurate. It's intended to be an approximation. This objection would be the type of an objec-

(Testimony of Helen Husted.)

tion that would prohibit the witness from drawing the approximate positions of a car after the automobile accident because they didn't have it down to within an inch. It's simply to show that the building that housed the office, the United States government gauger's office, was a truck and a half lengths or so of the warehouses.

The Referee: Anything further gentlemen? Petitioner's Exhibit No. 69 for Identification, overruled, No. 69 in Evidence.

Q. Now, Mrs. Husted, during the period of time of approximately May '45 to sometime in March of '49, to your knowledge were the warehouse receipt books with the copies in them as they appear there, at all times there in the office or in the vault? A. I would say they were.

Q. Now—

Mr. Walsh: What was that last answer?

The Witness: I would say they were.

Mr. Walsh: You say you would say they were.

Q. Now, Mrs. Husted, among your general duties there, as I understand it, was a stenographer writing letters. A. Yes, sir.

Q. And one thing and another. And I take it that you are [1469] and were acquainted during those periods of time, with Mr. R. I. Stone?

A. Yes, sir.

Q. And Mr. D. F. Logan? A. Yes, sir.

Q. And Mr. Henry Roberts? A. Yes, sir.

Q. And Mr. McMains? A. Yes, sir.

Q. I always forget. W. S. McMains, is it?

(Testimony of Helen Husted.)

A. Yes, sir.

Q. And are you familiar with their signatures?

A. Yes, sir.

Q. Have you seen each one of those gentlemen sign their names from time to time during that period?

A. Yes, sir.

Q. And have you handled the letters for them—correspondence?

A. Yes, sir.

Q. Referring to Petitioner's Exhibit No. 43, referring to these warehouse receipts, simply for the sake of brevity I am going to omit the B because it's on all of them. I am just going to refer to the numbers if that's all right. Referring to Exhibit No. 43, I show you warehouse receipt No. 3525 and ask you to look at the two signatures appearing on that receipt and ask you if you recognize them?

A. Yes, sir.

Q. And those signatures are the signatures of whom?

A. Mr. R. I. Stone and Mr. McMains.

Q. And with reference to 3538, there appear to be two signatures that purport to be the signatures of Roberts and [1470] McMains. Do you recognize those signatures?

A. Yes, sir, those are their signatures.

Q. And directing your attention, the attention of Court and counsel to the back of that receipt, under the general caption "Storage Record" there appears to be what purports to be a withdrawal of 36 barrels from this receipt on June 2 and 3, 1948 and then it shows the balance left and the serial

(Testimony of Helen Husted.)

numbers and then under the caption "Signature" appears to be two sets of initials. Do you recognize the initials that are written there?

A. Yes, that's McMains' signature—initials.

Mr. La Shelle: This is one of the receipts that is undated, where the date was left off the receipt and the withdrawals show the date of the withdrawal portion of it about June 2 or 3, of '48 which establishes, at least according to our contention, that the receipt was issued sometime before June 2, '48.

Q. I show you warehouse receipt 3539 and ask you if you recognize those signatures. If you do, state whose they are.

A. Mr. McMains and Mr. Logan they are.

Q. And with reference to warehouse receipt 3541, I ask you the same question, as to whether you recognize the signatures and whose they are.

A. Yes, sir, Mr. Stone and Mr. McMains.

Q. And with reference to 3543, the same question with reference to the signatures. [1471]

A. Mr. Stone and Mr. McMains.

Q. With reference to 3544, the same question.

A. Mr. Stone and Mr. McMains.

Q. And with reference to 3545, the same question. A. Mr. Stone and Mr. McMains.

Mr. La Shelle: That completes the warehouse receipts group No. 43 for Identification. And on the back of this, your Honor will note that you have written Schenley, Petitioner's No. 43 in Evidence, January 26, 1950. However, at the same time, there was a statement made by you in the record that

(Testimony of Helen Husted.)

what was in evidence was limited to the documents behind the warehouse receipts which were commonly called supporting documents for the purpose of description. The warehouse receipts as such did not go into evidence at that time. We now, on Petitioner's Exhibit 43, offer the warehouse receipts 3525, 3538, 3539, 3541, 3543, 3544, and 3545 and ask that they be considered in evidence along with the other documents in Petitioner's No. 43.

Mr. Fisk: May I ask the witness a couple of questions?

The Referee: On the offer of this exhibit?

Mr. Fisk: Yes, on the offer of these.

Voir Dire Examination

By Mr. Fisk: Q. Mrs. Husted, you have no— or do you have any recollection at the present time of having typed out these particular—

A. No, there were so many of them, I wouldn't—

Q. You don't have any— A. No.

Q. But you were a stenographer at Hedgeside during the period that these documents bear dates, is that right? A. Yes, sir.

Q. Did anyone else there beside you type out—

A. Occasionally.

Q. Who else, beside you?

A. You see, I only worked from nine until four-thirty and if there was ever occasion to have a warehouse receipt before that and in the morning or after that and in the evening then it was up to someone else to do it.

(Testimony of Helen Husted.)

Q. Well, did Mr. McMains sometimes type these?

A. Sometimes, sir.

Q. And did Mr. Roberts sometimes?

A. No, I don't think so.

Q. Did Mr. Stone sometimes type them?

A. No, I don't think so.

Q. You didn't keep the warehouse receipt book yourself, did you?

A. No, not at my desk. It was always in the vault any other time when I needed them.

Q. You could just go into the vault and get it, but you [1474] personally weren't delegated the custody, were you, of these books?

A. Well, nobody else particular handled them beside me. I mean, it was considered like some other form that I would be using in the course of a day's work.

Q. When you typed one of these books, did you check any records at all?

A. No, sir, I did it on instruction.

Q. One of these individuals that you have just named would come over to you and say type out a warehouse receipt and give you the date it took place.

A. Mr. McMains generally, sir. Yes.

Q. You never at any time made any check on these receipts.

A. No, sir.

Mr. La Shelle: Mrs. Husted, if you shake your head, the reporter can't hear.

The Witness: Excuse me.

(Testimony of Helen Husted.)

Mr. La Shelle: She doesn't know whether you are saying yes or no.

Q. Then you typed the original and two carbons, is that right? A. Yes, sir.

Q. All of which were taken out of the book.

A. Yes, sir.

Q. Did you then replace the carbons in the book?

A. Yes, sir, immediately.

Q. Immediately. A. Yes, sir. [1475]

Q. Do you mean before you even handed the original to anyone?

A. That was—you see, my desk at the office was in proximity to Mr. McMains and it was just a question of turning around and dropping the original on his desk so that I do that and then put the copies back in.

Q. Usually, you would get instructions from Mr. McMains? A. Yes, sir.

Q. And you would make out these warehouse receipts and you would turn around and drop the original on his desk and then you paste the two copies back in the book and put the book back in the safe. A. Yes, sir.

Q. And forget about it, is that right?

A. Yes, sir.

Q. You don't know what Mr. McMains did with the original. You didn't pay any attention to that, is that correct?

A. Well, I know what he did with it.

Q. Well, it wasn't part of your duties to see what he did with it.

(Testimony of Helen Husted.)

A. Not to check, no, sir.

Q. You just made it out and handed it to him.

A. Yes, sir.

Q. You didn't know whether he signed it or who signed it.

A. Well, he did sign it.

Q. Unless it was brought to your attention later. Did you get that?

A. I follow you all right, yes. There was no reason for [1476] me to check to see that it was carried through.

Q. You didn't make any check to see if the warehouse receipt had already been issued.

A. No, sir.

Q. Covering the same goods.

A. That was not assigned to me.

Q. I say, you made no check at any time nor were you ever at any time given any instructions to that effect.

A. No, sir.

Q. Is that right?

A. That's right, sir.

Q. Did you ever question Mr. McMains at any time?

A. No, sir.

Q. Or Mr. Stone?

A. Oh, no, sir.

Q. You say that with a good deal of emphasis. Will you elucidate a little?

A. If you were my supervisor, I wouldn't question your judgment either.

Q. In other words, Mr. Stone was the final say in Hedgeside at that time, is that right?

A. Well, I would say this. That any instruction I might receive from a supervisor, I, personally, would never question.

(Testimony of Helen Husted.)

Q. But particularly, Mr. Stone.

A. Oh, I don't say particularly Mr. Stone.

Q. You don't know whether these documents ever went out of the possession of Hedgeside, do you?

A. The originals?

Q. Yes, these particular ones here. [1477]

A. Oh, I can't say as to those particular ones but it's—

Q. And that—Are you finished?

A. Inasmuch as the owner of the goods on top there is indicated in each instance, it would be assumed that they would go to the proper parties.

Q. But you have no personal knowledge of that.

A. Oh, no. I would have no reason to know.

Q. On warehouse receipt 3538-B, do you recognize that signature?

A. Yes, sir.

Q. Under Hedgeside Distillery Corporation, as being whose signature?

A. Mr. McMains.

Q. And do you recognize the handwriting on the back?

A. Yes, sir, it's Mr. McMains'.

Q. Do they appear to you to have been placed there at the same time?

Mr. La Shelle: Well, just a moment, your Honor, we object to that question. Nobody can tell—

Mr. Fisk: She's examined it as a handwriting expert, your Honor.

Mr. La Shelle: Oh, no.

The Referee: One at a time.

Mr. La Shelle: We object to that. This witness

(Testimony of Helen Husted.)

states she is familiar with the signature. She is not a handwriting expert. This is not proper cross-examination as to when the signatures were placed. That's guess work. [1478]

The Referee: Sustained.

Q. Do you recognize the handwriting on the back? A. Yes.

Q. Do you know when the handwriting was placed on the back? A. Yes.

Mr. La Shelle: We make the same objection as heretofore made, your Honor.

The Referee: She may answer. Do you know when it went on there?

A. No, except from the information that's on the receipt. I would say that the withdrawals were made on June 2 and 3, 1948. I can't say whether he put that information on there on the second or the third or maybe didn't get to it until a day or two later. I can't tell you that.

Q. You just recognize that as his handwriting.

A. Yes, sir.

Q. And under the column on the back of the warehouse receipt, under the column "storage record" under the heading "signatures," the first signature seems to be an initial. Do you recognize that? A. Yes, sir.

Q. Whose initial is that?

A. Those are Mr. McMains'.

Q. And what is the second signature?

A. His, too.

Q. Those are initials of the same person?

(Testimony of Helen Husted.)

A. Yes, sir. [1479]

Q. Now, in the column over to the right "quantity due on receipt" it appears to have been first filled out in pencil.

A. That's right.

Q. Was that customary?

A. Mr. McMains often did that.

Q. He would fill it out in pencil and then write over it in ink?

A. Yes, sir.

Q. Did he do it at the same time?

A. Well, maybe and maybe not.

Q. Well, did he have difficulty writing or spelling?

A. No.

Q. Why did he fill out first in pencil and then write over it in ink?

A. Well, you know Mr. Fisk, that Mr. McMains is a little bit—has a little palsy condition, you know.

Q. No, I did not know.

A. Didn't you? Well, he sometimes fills out in pencil and then goes over it in ink. I mean, if you saw the man personally—

Q. But this is his handwriting, is it not?

A. Yes.

Q. And wouldn't you say that is good penmanship?

A. Yes, sir, he writes very nicely.

Mr. La Shelle: Just a moment. When you say "this," you are referring to the lettering under date?

Mr. Fisk: Yes. [1480]

A. (Continuing): But he may, when he was doing this you see, have a group of receipts that he

(Testimony of Helen Husted.)

was checking out at the same time and wrote this information on. Maybe there are several others in the group that were taken care of at the same time and then he went back and made a permanent record of it.

Q. And did he have a practice of filling out certain information at one time and then later adding to it?

A. No, it depends how it all comes up. I mean, if you have several to do at one time, you perhaps would follow the same procedure yourself sometime.

Mr. Fisk: Well, your Honor, that's all the questions I have to ask her—of Mrs. Husted on voir dire. I object to it on the grounds there is no foundation laid that these documents were ever delivered.

Mr. Walsh: I make the same objection, if your Honor please.

Mr. La Shelle: We submit the objection, your Honor.

The Referee: 43, formerly marked in evidence, exclusive of the warehouse receipts, now becomes 43 in Evidence, including the warehouse receipts.

Mr. La Shelle: Referring now, your Honor, to Petitioner's Exhibit No. 49 in Evidence, which has the same status as 43, the supporting documents are in evidence but the warehouse receipts are not yet in [1481] evidence, going on down the list Frank, so that you can follow it, the first receipt is 3381.

(Testimony of Helen Husted.)

By Mr. La Shelle: Q. Would you examine the signatures on that receipt and tell us if you recognize the signatures, and if so, whose they are?

A. The signatures of Mr. Stone and Mr. McMains.

Q. And warehouse receipt 3833, the same question. A. Mr. Stone and Mr. McMains.

Q. And 3384 the same question.

A. Mr. Logan and Mr. McMains.

Q. And 3385 the same question.

A. Mr. Logan and Mr. McMains.

Q. And 3392 the same question.

A. Mr. Logan and Mr. McMains.

Q. And 3393 the same question.

A. Mr. Logan and Mr. McMains.

Q. I think technically, you didn't exactly answer my question. The question was: Do you recognize the signature? A. I do.

Q. And if so, whose they are? A. I do.

Q. And I take it from the answers that you recognize them? A. Yes, sir.

Q. And that they are the signatures of the gentlemen you mentioned. A. Yes, sir.

Q. And with reference to 3398, the same question. Wait a minute. Have I gone beyond my exhibit number? [1482]

The Referee: No.

Q. 3398? Mr. Logan and Mr. McMains.

Q. And 3399?

A. Mr. Logan and Mr. McMains.

Q. 3400? A. Mr. Logan and Mr. McMains.

(Testimony of Helen Husted.)

Q. 3402? A. Mr. Logan and Mr. McMains.

Q. And 3403?

A. Mr. Stone and Mr. McMains.

Q. 3404? A. Mr. Logan and Mr. McMains.

Q. 3407? A. Mr. Logan and Mr. McMains.

Mr. La Shelle: That comprises the group in Petitioner's Exhibit No. 49.

(Discussion off the record.)

Mr. La Shelle: With reference to Petitioner's Exhibit No. 49, we offer those warehouse receipts in evidence along with the other groups at this time, your Honor.

Mr. Fisk: Same objection.

Mr. Walsh: Same objection, your Honor.

The Referee: Exclusive of the memorandums attached, Petitioner's Exhibit No. 49 in evidence, exclusive of the warehouse receipts, now will include the warehouse receipts and excluding the memorandums.

Q. Mrs. Husted, I show you Petitioner's Exhibit for Identification No. 45-A, which purports to be a letter from Hedgeside to Schenley, dated November 27, 1948. Is there anything on that letter that would indicate to you whether or [1483] not you typed it?

A. Yes, sir, the signature line. (indicating)

Q. You pointed to a line where it say "WM:H."

A. Right, sir.

Q. And what does "WM" represent?

A. Mr. McMains.

Q. And this "H" is—— A. Mine.

(Testimony of Helen Husted.)

Q. For Helen? A. Yes, sir.

Q In other words, when you type a letter, you type in the small letter "h" to indicate you typed it. And do you recognize that signature on that letter? A. Yes, sir, that's Mr. McMains.

Mr. La Shelle: We have previously referred to this in the record as Petitioner's Exhibit No. 45 which is also attached office copy of a letter replying to that which I have in my notes as "A" is this (indicating) and "B" is that, although it does not appear here. But in any event, we offer this letter in evidence at this time.

Mr. Fisk: Well, your Honor, I am certainly going to object to that. Here is a letter, what purports to be a letter on the letterhead of Hedgeside Distillery Corporation and it is according to this witness, signed by W. S. McMains and that's all there is as far as showing that this letter ever went out—the fact that this witness says that she typed it. There may be some presumptions in connection with the warehouse receipt [1484] but there are no presumptions in connection with this letter.

Mr. La Shelle: May it please the Court——

Mr. Fisk: Furthermore, it's——

Mr. La Shelle: It has been produced by the person to whom it is addressed, to-wit, Schenley.

The Referee: Did you finish, Mr. Fisk?

Mr. Fisk: Yes, sir.

The Referee: Anything further, Mr. La Shelle?

Mr. La Shelle: We are not offering at this time the yellow copy.

(Testimony of Helen Husted.)

The Referee: Petitioner's 45 for Identification contains a yellow copy dated December 1, 1948, typewritten Schenley Distillers Corporation to Hedgeside Distillery Corporation. That is the first sheet. The second sheet is a letter dated November 27, 1948 signed Hedgeside Distillery Corporation, W. S. McMains, secretary, addressed to Schenley Distillers Corporation, 850 Battery Street, San Francisco, California, attention Mr. Baglin and there is attached to the letter, Schenley Distillers Corporation inventory IRBW-111. Now, Mr. La Shelle, what are you offering?

Mr. La Shelle: I am not offering this at this time, your Honor.

The Referee: What do you mean by "this"?

Mr. La Shelle: Oh, I'm sorry. I'm not offering the [1485] yellow office copy dated December 1. I have not qualified that. I am offering the letter dated November 27, 1948 and the enclosures attached to it as mentioned in the letter.

Mr. Fisk: Your Honor, I would like to make a further objection that it's self-serving and hearsay as far as the Bank is concerned. That letter is offered for the purpose of proving the contents.

The Referee: Anything further, Mr. Walsh?

Mr. Walsh: No.

The Referee: Petitioner's 45 for Identification becomes 45 in Evidence, exclusive of the top yellow sheet dated December 1, '48, together with the attachment that is referred to in the letter of November 27, a list of the merchandise to be transferred,

(Testimony of Helen Husted.)

giving serial and warehouse receipt numbers as attached. I have just read from the letter. We will have a recess for a couple of minutes, gentlemen. That's 45 in evidence.

Mr. La Shelle: Yes, your Honor.

The Referee: Exclusive of the yellow sheet.

(A brief recess was taken.)

After Recess.

Q. Referring to Exhibit No. 50, I show you warehouse receipt No. 3511 and ask you if you can identify the signatures on that warehouse receipt?

A. The signatures are Mr. Stone and Mr. McMains.

Q. And the same question with reference to warehouse receipt 3512.

A. Mr. Stone and Mr. McMains.

Q. And the same question with reference to 3671?

A. Mr. Robert and Mr. McMains.

Q. And then I will also show you in connection with that receipt number 3671, a letter on Hedge-side letterhead addressed to Schenley, dated December 6, 1948 and ask if you recognize that signature?

A. That is Mr. McMains' signature.

Q. And is that a letter that you typed?

A. Yes, sir.

Q. That has the initial "H" down at the bottom.

A. That's right.

Q. And I'll show you 3673 and ask you the same question with reference to the signatures.

A. Signed by Mr. Robert and Mr. McMains.

(Testimony of Helen Husted.)

Q. And I'll also show you in connection with that receipt 3673, a letter dated December 7 on Hedgeside letterhead addressed to Schenley and ask you if you can tell us whose signature that is.

A. Mr. McMains.

Q. And did you type that letter?

A. Yes, sir, I did.

Q. From the letter "H", I take it.

A. Yes, sir. [1487]

Mr. La Shelle: At this time, your Honor, on Exhibit No. 50, we ask that the warehouse receipts themselves go into evidence as in the other exhibits and that attached to 3671 and 3673 that these two letters go into evidence, which are the letters which enclose the warehouse receipts in question. That originally was on the bottom of the exhibit. But these letters were excluded from evidence, along with the warehouse receipts, at the time the supporting documents went in. They were clipped to the back of the warehouse receipts in question.

Mr. Fisk: I would like to make the same objection as to the warehouse receipts and the same objection as the last one.

Mr. Walsh: I will join in the same objection.

Mr. Fisk: As far as the Bank is concerned, the letters are self-serving and hearsay and not binding on the Bank.

The Referee: Petitioner's Exhibit No. 50 in Evidence as of January 26, 1950, exclusive of the letters and the warehouse receipts, the entire set of documents, the objection is overruled and Petition-

(Testimony of Helen Husted.)

er's Exhibit No. 50 includes the warehouse receipts and the two letters referred to by counsel for the petitioner, together with the supporting documents. And I take it that the respondents have no objection with reference [1488] to the substitution of photostatic copies of the warehouse receipts without waiving any of your other objections to the documents.

Mr. Fisk: No, but we were never given copies of the letters.

Mr. La Shelle: Well, I mean, as a matter of courtesy, Mr. Fisk, I have provided you with many, many copies, although not required to.

Mr. Fisk: I understand, but if it is being substituted, I want to know.

Mr. La Shelle: No, no.

The Referee: No, so there will be no misunderstanding in the record, the original letters are remaining in evidence. Counsel for the petitioner has substituted photostatic copies of the warehouse receipts.

Mr. La Shelle: That has already been done quite some time ago.

Mr. Fisk: No objection to that.

Mr. La Shelle: The letters themselves, I haven't had any copies made. The originals are in evidence and will stay in.

Q. Referring to Exhibit No. 51 in Evidence, which has the same status in evidence as No. 43, beginning with warehouse receipt No. 3674, refer-

(Testimony of Helen Husted.)

ring to 3674, warehouse receipt, I hand you the same and ask you to identify the signatures on that.

A. The signatures are those of Mr. Robert and Mr. McMains. [1489]

Q. And 3675 the same question?

A. The signature of Mr. Robert and Mr. McMains.

Q. And 3676?

A. The signature of Mr. Robert and Mr. McMains.

Q. 3678?

A. Mr. Stone and Mr. McMains.

Q. And 3679, the same question?

A. Mr. Robert and Mr. McMains.

Q. And 3680 the same question?

A. Mr. Robert and Mr. McMains.

Q. And 3685 the same question?

A. Mr. Robert and Mr. McMains.

Q. And 3686 the same question?

A. Mr. Robert and Mr. McMains.

Q. And 3687 the same question?

A. Mr. Robert and Mr. McMains.

Q. And in connection with some or all of these warehouse receipts in that group, I'll show you seven letters on the letterhead of Hedgeside, addressed to Schenley, dated December 8, 1948, December 9, 1948, December 10, 1948, December 17, 1948, December 20, 1948, December 21, 1948, and December 22, 1948 and ask that you look at each one of those letters and attached signature and tell us whether or not you typed them.

(Testimony of Helen Husted.)

A. Mr. McMains signed them and I typed them.

Q. And that is the whole set of letters.

A. Yes, sir. [1490]

Mr. La Shelle: Now, with reference to this Exhibit No. 51, your Honor, we ask that these warehouse receipts be now received in evidence and I will attach to the warehouse receipts these letters that correspond by number as they were before, the original letters, one for 3674, one for 3675, 3676, 3678 (which I'm clipping in all instances to the back of the document), 3679, 3680, 3685, and I have got two letters here that were not clipped. They were shoved in, as we ran out of clips. I'll show you two further letters on the Hedgeside letterhead to Schenley, dated December 23, 1948 and one dated December 27, 1948 and ask you to examine those two letters and identify the signature and whether or not you wrote them.

A. The signature is Mr. McMains and I wrote them in both instances.

Q. By "wrote them" I mean you typed them.

A. Typed them.

Mr. La Shelle: I'll clip the warehouse receipt in the letter, clipping to the warehouse receipt will be clipped in back.

Mr. Ward: Those last two were 3686 and 3687?

Mr. La Shelle: 3686 and 3687.

The Referee: Mr. La Shelle, did I understand you to say you were offering these original letters and the warehouse receipts in evidence? [1491]

Mr. La Shelle: Yes.

(Testimony of Helen Husted.)

The Referee: Formerly a part of 51.

Mr. La Shelle: That's right, your Honor.

The Referee: Mr. Fisk?

Mr. Fisk: I should like to make the same objection to the introduction in evidence of the warehouse receipts and of each of the nine letters to the warehouse receipts. There is no showing of delivery and as to the nine letters, to each of the nine letters, they are hearsay and they are self-serving as far as the Bank.

The Referee: Mr. Walsh?

Mr. Walsh: I make the same objection, your Honor.

The Referee: The objection is overruled. Petitioner's Exhibit No. 51 now includes the warehouse receipts in evidence and the letters referred to.

Q. Now, referring to Exhibit No. 52, which has the same status as 43 had, beginning with warehouse receipt No. 3364—Gentlemen, I might state, so counsel won't be looking for it, in this group there are none of these letters involved—showing you warehouse receipt No. 3364, will you identify the signatures on that?

A. Mr. Logan and Mr. McMains.

Q. And No. 3365?

A. Mr. Stone and Mr. McMains.

Q. And 3366 the same question? [1492]

A. Mr. Logan and Mr. McMains.

Q. And 3386 the same question?

A. Mr. Logan and Mr. McMains.

(Testimony of Helen Husted.)

Q. And 3391 the same question?

A. Mr. Logan and Mr. McMains.

Q. And 3394 the same question?

A. Mr. Logan and Mr. McMains.

Q. And 3395 the same question?

A. Mr. Logan and Mr. McMains.

Q. And 3396 the same question?

A. Mr. Logan and Mr. McMains.

Q. And 3397 the same question?

A. Mr. Stone and Mr. McMains.

Q. And 3401 the same question?

A. Mr. Logan and Mr. McMains.

Q. And 3405 the same question?

A. Mr. Logan and Mr. McMains.

Q. And 3406 the same question?

A. Just by Mr. McMains. It is not counter-signed.

Mr. Walsh: Just a minute, may I see that?

Q. And 3408 the same question?

A. Mr. Logan and Mr. McMains.

Q. And 3409 the same question?

A. Mr. Logan and Mr. McMains.

Q. 3410 the same question.

A. Mr. Logan and Mr. McMains. [1493]

Q. 3412 the same question.

A. Mr. Logan and Mr. McMains.

Q. 3414 the same question.

A. Mr. Stone and Mr. McMains.

Q. 3420 the same question.

A. Mr. Logan and Mr. McMains.

Q. 3435 the same question.

(Testimony of Helen Husted.)

A. Mr. Logan and Mr. McMains.

Mr. La Shelle: Let the record show, your Honor, that the various warehouse receipts that I have been showing the witnesses have been originals marked by the Court. As to the group Petitioner's Exhibit No. 52, consisting of those warehouse receipts (and as I said before, there were no letters involved here), we ask that the warehouse receipts, the photostatic copies which the Court has and marked No. 52, that the warehouse receipts in addition to the the other documents, be now entered in evidence.

Mr. Fisk: Same objection, your Honor, as to the warehouse receipts.

Mr. Walsh: I make the same objection, your Honor please, with the additional objection that warehouse receipt 3406-B shows on its face it is not a completed warehouse receipt.

Mr. Fisk: I should like to make the same objection, too, your Honor. [1494]

The Referee: Overruled. Petitioner's Exhibit No. 52 in evidence will now include the warehouse receipts and let the record further show that the Court has only indicated on the documents that are in evidence, the markings of the exhibit numbers and I haven't indicated other than the original identification on the originals.

Mr. La Shelle: Do you think that's necessary?

The Referee: Well, as long as the record is clear on it so there will be no misunderstanding at some later date between the originals and the copies that are in evidence.

(Testimony of Helen Husted.)

Q. I am now working with 53, your Honor, and there are three letters involved here. In Petitioner's Exhibit No. 53 (again let the record show that I am using the original certificates) I'll show you warehouse receipt No. 3480 and ask you to identify the signatures on those.

A. Mr. McMains and Mr. Logan.

Q. And the same question on 3481?

A. Mr. Logan and Mr. McMains.

Q. And the same question with reference to 3482?

A. Mr. Stone and Mr. McMains.

Q. And the same question with 3484?

A. Mr. Stone and Mr. McMains.

Q. The same question with reference to 3486?

A. Mr. Stone and Mr. McMains. [1495]

Q. And the same question with reference to 3505?

A. Mr. Stone and Mr. McMains.

Q. And the same question with reference to 3509?

A. Mr. Stone and Mr. McMains.

Q. And the same question with reference to 3510?

A. Mr. Stone and Mr. McMains.

Q. And the same question with reference to 3529?

A. Mr. Logan and Mr. McMains.

Q. The same question with reference to 3530?

A. Mr. Logan and Mr. McMains.

Q. The same question with reference to 3567?

A. Mr. Stone and Mr. McMains.

Q. The same question with reference to 3568?

A. Mr. Stone and Mr. McMains.

Q. The same with reference to 3569?

(Testimony of Helen Husted.)

- A. Mr. Stone and Mr. McMains.
- Q. And the same with reference to 3572?
- A. Mr. Stone and Mr. McMains.
- Q. And the same with reference to 3573?
- A. Mr. Stone and Mr. McMains.
- Q. And the same with reference to 3575?
- A. Mr. Stone and Mr. McMains.
- Q. And the same with reference to 3590?
- A. Mr. Stone and Mr. McMains.
- Q. And the same with reference to 3592?
- A. Mr. Stone and Mr. McMains. [1496]
- Q. And the same with reference to 3593?
- A. Mr. Stone and Mr. McMains.
- Q. And the same with reference to 3597?
- A. Mr. Stone and Mr. McMains.
- Q. And the same with reference to 3598?
- A. Mr. Stone and Mr. McMains.
- Q. And the same with reference to 3602?
- A. Mr. Stone and Mr. McMains.
- Q. And the same with reference to 3605?
- A. Mr. Logan and Mr. McMains.
- Q. And the same with reference to 3606?
- A. Mr. Stone and Mr. McMains.
- Q. And the same with reference to 3610?
- A. Mr. Stone and Mr. McMains.
- Q. And the same with reference to 3616?
- A. Mr. Stone and Mr. McMains.
- Q. And the same with reference to 3617?
- A. Mr. Logan and Mr. McMains.
- Q. And the same with reference to 3618?
- A. Mr. Logan and Mr. McMains.

(Testimony of Helen Husted.)

Q. And the same with reference to 3619?

A. Mr. Stone and Mr. McMains.

Q. And the same with reference to 3621?

A. Mr. Stone and Mr. McMains.

Q. And the same with reference to 3622?

A. Mr. Stone and Mr. McMains. [1497]

Q. And the same with reference to 3623?

A. Mr. Stone and Mr. McMains.

Q. And the same with reference to 3624?

A. Mr. Stone and Mr. McMains.

Q. And the same with reference to 3629?

A. Mr. Stone and Mr. McMains.

Q. And the same with reference to 3631?

A. Mr. Stone and Mr. McMains.

Q. And the same with reference to 3665?

A. Mr. Stone and Mr. McMains.

Q. And the same with reference to 3669?

A. Mr. Stone and Mr. McMains.

Q. And the same with reference to 3670?

A. Mr. Stone and Mr. McMains.

Q. Now, then, I will show you three letters on the letterhead of the Hedgeside, addressed to Schenley, dated—two dated December 2, 1948 and one dated December 3, 1948, the one letter dated December 2 has just two paragraphs and the other is a little longer and has four paragraphs. Will you look at each one of those three letters, identify the signature and state whether or not they were typed by you?

A. Mr. McMains signed them and I typed them.

Mr. La Shelle: Your Honor, here the long form

(Testimony of Helen Husted.)

of letter dated December 2, 1948, the one that has four paragraphs, refers, your Honor, to this letter (indicating) and then acknowledges receipt of it and [1498] at this time, we ask that the warehouse receipts in this group, No. 53 in evidence, be considered in evidence along with the rest of the documents and that these three letters, two of them dated December 2 and the other dated December 3, from Hedgeside to Schenley, be also received in evidence and I'll clip them all to the back because the warehouse receipts correspond to them by number. And we also ask at this time that the yellow office copy there that is marked for identification, be also marked and be considered in evidence.

The Referee: Read the letter that it refers to.

Mr. Fisk: Your Honor, I should like to make the same objection to the offer of the warehouse receipts as previously made and to the three letters of December 3 and two on December 2, 1948, Hedgeside to Schenley. As to the offer of the copy of the letter, unsigned copy of the letter of Schenley Distillers Corporation, dated December 1, 1948, I submit that that letter is secondary evidence and no demand has ever been made upon the trustee to produce the original, and I submit that.

Mr. Walsh: Same objection, your Honor.

Mr. La Shelle: Your Honor, I will read this letter. In other words, this letter—

The Referee: I understand that, Mr. La Shelle, but Mr. Fisk's further objection is that the copy shows [1499] that it was addressed to Hedgeside

(Testimony of Helen Husted.)

Distillery Corporation and Mr. Fisk claims that to his knowledge, no demand has ever been made on the trustee of Hedgeside Distillery Corporation for the production of the original document.

Mr. La Shelle: Well, in view of the fact that this letter of December 2 of Hedgeside acknowledges receipt of this letter, I submit, your Honor, that it's unnecessary.

Mr. Fisk: Well, there could be two letters on the first. I submit it's hearsay as far as we are concerned.

Mr. La Shelle: No, this letter of December 1 acknowledges receipt of this letter enclosing the warehouse receipts and says "enclosed in accordance with the attached schedule are warehouse receipts requested by you." This letter says: "This morning we received your letter of December 1, 1948 with the original Mountain View warehouse receipts as per we sent you. Thank you very much for your prompt attention in this matter." Not only the letter is acknowledged, but the subject matter is definitely acknowledged.

Mr. Fisk: I don't think that makes any difference.

The Referee: Well, the Bank still is entitled to the original letter if it is available, is it not true? We have the Bank involved and we have the trustee in bankruptcy involved. [1500]

Mr. La Shelle: And as far as that's concerned, your Honor, this involves warehouse receipts that the Bank isn't even claiming.

(Testimony of Helen Husted.)

The Referee: Well, then you have never asked the trustee for the original letter, have you?

Mr. La Shelle: Well, I don't believe that it's necessary.

The Referee: If it's not necessary, why then, the yellow sheet is not necessary to prove your case.

Mr. La Shelle: Well, we'll submit the offer.

The Referee: Very well. Then Exhibit No. 45 formerly in evidence, exclusive of the yellow copy, still remains the same. Then as far as the objection of the Bank and the trustee to the offer of the petitioner to No. 53, it is overruled and the warehouse receipts are received in evidence, together with all of the letters including the letter dated December 2, 1948.

Mr. La Shelle: The one that's mentioned is 3665 and there are two others, your Honor.

Mr. Ward: You mean, I have the letter which refers to that yellow copy?

The Referee: That's the one—December 2, 1948.

Mr. La Shelle: There are two letters dated December 2, one has four paragraphs and encloses receipt 3665. That's the one that refers to the list of [1501] warehouse receipts being sent. As the Judge has pointed out, in view of that letter and the other letter, this letter becomes irrelevant and does not really amount to anything.

Mr. Fisk: As I understand, the Court has sustained our objection to the offer of the secondary evidence—the copy.

The Referee: The Court has sustained the ob-

(Testimony of Helen Husted.)

jection to the receipt in evidence of the yellow copy dated December 1, 1948, which is a part of Petitioner's No. 45 for Identification, 45 in Evidence, being a letter dated November 27, 1948 from Hedgeside to Schenley and the attached document being an inventory. The objection is sustained to the yellow sheet.

Mr. La Shelle: Those three letters have been attached to the warehouse receipts that correspond to it in No. 53, your Honor.

The Referee: And are received.

(Discussion off the record.)

The Referee: It is my understanding that there are certain letters that have been received in evidence that you want to withdraw for the purpose of making copies for yourself and the respondents.

Mr. La Shelle: Yes.

The Referee: And there is no objection, Mr. Walsh?

Mr. Walsh: No. [1502]

The Referee: Mr. Fisk?

Mr. Fisk: No.

The Referee: No objection.

Mr. La Shelle: There are fourteen letters. And they are identified in the record by their dates.

The Referee: And if I turn this over to you so you will pick them out, then you will also have the added responsibility of inserting them back in the same place?

Mr. La Shelle: Yes.

(An adjournment was taken until May 16, 1950 at 10:00 a.m.) [1503]

Tuesday, June 13, 1950

Same appearances.

The Referee: And in the matter of Hedgeside, Mr. La Shelle is returning certain letters that formerly were a part of exhibits——

Mr. La Shelle: 50, 51 and 53, your Honor.

The Referee: Very well.

Mr. La Shelle: And if you will just make a note in the record that the letter which belongs to warehouse receipt No. 3665 is returned and receipt No. 3669 and No. 3670. Those three receipts are in Exhibit No. 53. Then, your Honor, if I may have 50 and 51——

The Referee: Here is 51 and here is No. 50.

Mr. La Shelle: The letter belonging to warehouse receipt No. 3671 is returned and 3673. Those are both Exhibit 50 and Exhibit 51 there's a letter returned for 3674, 3675, 3676, 3678, 3679, 3680, 3685, 3686, and 3687, all of the exhibits. Mrs. Husted.

HELEN HUSTED

having been previously sworn by the Referee, resumed the stand and testified further as follows:

Mr. La Shelle: If it please the Court, Mrs. Husted was on at the last hearing and I finished my direct. She is now here for cross-examination.

Mr. Fisk: Shall we proceed, your Honor? [1504]

The Referee: Yes, Mr. Fisk.

(Testimony of Helen Husted.)

Cross-Examination

By Mr. Fisk: Q. Mrs. Husted, I believe that you testified that you went to work for Hedgeside, which is outside of Napa, in 1945? A. Yes, sir.

Q. And then that you worked continuously for Hedgeside from 1945 until March of 1949.

A. Yes, sir.

Q. All during that period, did you work at the distillery properties there at Napa?

A. Yes, sir.

Q. Atlas Way and what's the other street?

A. Monticello Road.

Q. Monticello Road. A. Uh-huh.

Q. And I believe you also testified that a considerable portion of that time you were the only stenographer working there. A. That's right.

Q. Do you recall the portions of that period when there was another stenographer working there?

A. No; Mr. Fisk, there was never another stenographer as such.

Q. What do you mean by "as such?"

A. Well, the other girls in the office might do work for notes, don't you know, but not an actual stenographer.

Q. I see. Were there any other typists there?

A. Well, practically everybody in the office typed.

Q. Well, you mean they could use a typewriter but they didn't in the regular course of business do typing for Hedgeside. [1505]

A. That's right.

(Testimony of Helen Husted.)

Q. Did you do any work during that period for Franciscan? A. Yes, sir.

Q. And the work that you performed for Franciscan you did at the premises of Hedgeside, is that right? A. Yes, sir.

Q. Now, from whom did you receive your pay?

A. Both Hedgeside and Franciscan.

Q. When you commenced working for Hedgeside in 1945, who employed you?

A. Hedgeside.

Q. Well, what individual?

A. Mr. Stone.

Q. And then were you paid by check?

A. Yes, sir.

Q. And you received checks both from Hedgeside and from Franciscan? A. Yes, sir.

Q. Throughout that period, from '45 to March '49, did you receive checks from Hedgeside and Franciscan? A. Yes, sir.

Q. Throughout the entire period?

A. With this exception, that I went off of the Franciscan payroll on the 15th of March.

Q. What year?

A. 1949. There's a fifteen-day interim where I worked for Hedgeside alone.

Q. You didn't leave Hedgeside then until April 1, '49, is that right?

A. Yes.

Q. Who signed the checks that you received from Franciscan?

A. Well, Mr. Fisk, the signature card at the

(Testimony of Helen Husted.)

bank says [1506] that Mr. Stone signs as an individual but it takes two other people to sign the check in case he is not there to sign it—two of the other officers.

Mr. Fisk: Well, now, I ask that the answer go out as not responsive.

The Referee: It may go out.

By the Referee: Q. Who actually signed the checks that you received?

A. Well, they were not always signed by the same person.

Q. And who would sign them then. Tell us the different people that signed them.

A. Well, I don't remember exactly what the other—I believe there are three people on the signature card.

Q. Well, never mind the card—just the checks that you received.

A. Mr. Stone signed them in some instances when he was there to sign them and if he were not, the two other authorized people signed them.

Q. Who else besides Mr. Stone signed your salary checks—what other names?

A. Mr. Logan and Mr. McMains.

Q. Who?

A. Mr. Logan and Mr. McMains.

By Mr. Fisk: Q. Now, you are speaking of the salary checks you received from Franciscan.

A. Yes, sir.

Q. Who signed the salary checks you received from Hedgeside? [1507]

(Testimony of Helen Husted.)

A. The same situation holds there. Mr. Stone as an individual, as president, signed them or if he were not there, two of the other officers.

Q. And the other two officers were Logan and McMains?

A. Yes. Mr. Logan and Mr. Roberts or Mr. Roberts and Mr. McMains. I mean, the combination of any two.

Q. In other words, your salary checks from Hedgeside were signed by Stone, Roberts, McMains, and Logan. Those are the only four individuals that signed either singly or collectively your checks from Hedgeside, is that right? A. Yes, sir.

Q. Now, your checks from Franciscan, the only individuals who signed either singly or together were Stone, McMains, and Logan.

A. Yes, sir.

Q. Did Roberts sign any checks?

A. I don't believe so, sir. I would have to look back to see, to be sure.

Q. Did you make out your own pay checks?

A. No, sir.

Q. You didn't type them out. A. No, sir.

Q. Who did, do you know?

A. Well, whoever was the payroll clerk at the time.

Q. Did they have a number of different payroll clerks there during the period you were connected with Hedgeside? A. Yes, sir.

Q. Do you recall their names?

A. Yes, sir.

(Testimony of Helen Husted.)

Q. Would you state who they were? [1508]

A. Mrs. Boss was there.

The Referee: How do you spell that?

The Witness: B-o-s-s.

A. (Continuing): A. Mrs. Borgone was there.

Mr. Walsh: How do you spell that?

The Witness: B-o-r-g-o-n-e.

Q. These are payroll clerks you are referring to?

A. Uh-huh.

Q. Who——

A. Robert Benning was there; Mrs. Wilcox for Franciscan, Margaret Corbett. I think that's all.

Q. All of those persons at some time had charge of keeping the payroll of either Hedgeside or Franciscan? A. Uh-huh.

Q. Is that right? A. Yes, sir.

Q. Did all of them at sometime keep the Hedgeside payroll and at sometime the Franciscan?

A. No. The assignments — the payroll assignments were made depending on which company they worked for. By that, I mean to say, that Hedgeside and Franciscan each had a bookkeeper or payroll clerk at the same time so that the checks for Franciscan were drawn by a different individual than the one who drew the Hedgeside check.

Q. Did any of those individuals you have just named at the same time serve both as payroll clerk for Hedgeside and Franciscan? A. No, sir.

Q. I didn't get your answer. A. No, sir.

Q. None of them at any time during the period you were there, served as payroll clerk for both of those institutions.

(Testimony of Helen Husted.)

A. No, sir. The operations were separate.

Mr. Fisk: I ask that the last answer go out.

The Referee: It may go out.

Q. You are positive of the last statement you have made, that is, that none of those persons at any time ever served as payroll clerk for Franciscan and Hedgeside. A. Yes, sir.

Q. On what bank was your payroll check from Hedgeside? A. Anglo Bank.

Q. On what bank was your payroll check from Franciscan? A. American Trust, Napa.

Q. How much were you paid per month for services rendered Hedgeside?

A. I started out there, I believe, at 175.

Q. You started out for Hedgeside at 175 a month? A. Yes, sir.

Q. And how long—that's in 1945.

A. Uh-huh.

Q. How long did that continue?

A. Oh, I don't remember exactly, Mr. Fisk.

Q. Well, was it eventually increased?

A. Yes, sir.

Q. Was it increased more than once?

A. I don't remember, sir. [1510]

Q. Did it fluctuate from month to month?

A. No, sir.

Q. Now, how much were you paid by Franciscan?

A. Franciscan, in the first instance, paid me \$25.

Q. A month. A. Yes, sir.

Q. And that continued for how long?

(Testimony of Helen Husted.)

A. Well, I can't remember when the raise came in.

Q. Well, did the pay that you received from Franciscan remain constant throughout your period of employment, that is, from '45 to March, 1949?

A. No, because I got, I believe, \$50 a month from Franciscan at the end.

Q. And you got those respective salaries from those two institutions regardless of the amount of work you did for each of them, is that right?

A. Yes, sir.

Q. Were you paid semi-monthly?

A. Yes, sir.

Q. Now, you testified that you made out the warehouse receipts, that is, you typed out the warehouse receipts.

A. Yes, sir.

Q. For Hedgeside.

A. Yes, sir.

Q. Did you type them out for Franciscan?

A. Yes, sir.

Q. Where were the Franciscan warehouse receipt books kept?

A. In the vault at Hedgeside.

Q. And the Hedgeside warehouse receipt books were kept at the same place, isn't that right?

A. Yes. [1511]

Q. Now, the vault at Hedgeside was in the main office building?

A. Yes, sir.

Q. That is the building where the main office was located.

A. Yes, sir.

(Testimony of Helen Husted.)

Q. And the building where the bottling plant was located. A. Yes, sir.

Q. And what else was located in that building?

A. The government office.

Q. The government gauger's office?

A. Yes, sir.

Q. Was down at one end.

A. At the far end, yes, sir.

Q. Anything else located in that building?

A. The rectifying room, the gin still on the second floor.

Q. What's the last—the gin still and——

A. On the second floor.

Q. All of those departments were in the same building. A. Yes, sir.

Q. Now, the Internal Revenue Bonded Warehouse No. 2 was an entirely separate building.

A. Yes, sir, right next to the office building.

Q. Well, they were on the same property.

A. Yes, sir.

Q. But they were entirely separate buildings, with no physical connection between them, isn't that correct?

A. There's just a small roadway for a truck to go through between them.

Q. And the roadway is what—forty or fifty feet wide? [1512]

A. No, sir, just about the width of two cars standing next to each other is all that's between those two buildings—very small space.

Q. Eighteen to twenty.

A. Yes, at the most.

(Testimony of Helen Husted.)

Q. But other than that, there was no physical connection between them at all. A. No, sir.

Q. Were these warehouse receipt books kept at all times in the vault in the office?

A. Yes, sir.

Q. Except when you took them out for typing.

A. Yes, sir.

Q. When you speak of that as a vault, it's a regular vault with a combination? A. Yes, sir.

Q. And did you have the combination?

A. No, sir.

Q. Who had the combination?

A. Mr. McMains.

Q. Did Mr. Stone have?

A. I don't know, but I presume——

Q. Was that vault regularly kept locked except when in use?

A. I don't know that, Mr. Fisk.

Q. The warehouse receipt books were bound books, permanently bound books with—somewhat on the order of a bank check book, were they not?

A. Yes, sir.

Q. And there were fifty numbered warehouse receipts in each book, is that right?

A. Yes, sir.

Q. And there was then, as to each of those fifty numbers, there was an original and two copies.

A. Yes, sir.

Q. And whenever you typed out an original, you typed out [1513] two carbon copies.

A. Yes, sir.

(Testimony of Helen Husted.)

Q. And in order to type them, you removed the original and the two copies from the book.

A. Yes, sir.

Q. In each instance. A. Yes, sir.

Q. Now, after the typing, I believe you testified you did turn over the original to Mr. McMains.

A. Yes, sir.

Q. And the two copies, what did you do with the two copies?

A. They were re-inserted in the book itself.

Q. And affixed to the stubs by you?

A. Yes, sir, scotch tape.

Q. Scotch tape. A. Yes, sir.

Q. And you performed that operation personally? A. Yes, sir.

Q. And you did it immediately after typing.

A. Yes, sir.

Q. In each instance.

The Referee: What was your answer to Mr. Fisk's last question?

A. Yes, sir, in each instance. I think there's a question on a couple of them. There may be a dozen of them but where there is no yellow copy pasted back in the book, I think that shows up on the list that we have here.

Q. Well, what I'm asking you—

A. So in those instances, that yellow copy did not—yellow or pink, whichever one it may be that's used in those [1514] instances—those dozen instances or so, they are not in the book—the two copies are not in the book.

(Testimony of Helen Husted.)

Q. Then as I understand your testimony, there were instances when the copies were not immediately replaced in the book.

A. Just in those ten or twelve that we have on the list that show up there.

Q. Well, do you have a present recollection of a particular ten or twelve in which you didn't follow that practice?

A. No, only insofar as it shows up on the list here.

Q. In other words, you have learned since you came into this courtroom the first time that there were certain instances where copies did not appear in the book, is that right?

A. No, there was always one in the book—always one in the book, but it seems to me, as I recall, that in these few instances that are showing up here, requests were made for the extra copies and we started to use the copies out of the book. I think the correspondence shows that requests were made for an extra copy of those receipts.

Q. Well, now, it is your testimony, as I understand it now, that in each instance you did immediately after typing, replace one copy.

A. Yes, sir, and in most instances two.

Q. Now, wait just a minute. I'll give you an opportunity. However, in certain instances, the second copy was held out for a period of time, is that right?

A. No, not held out because it never came back.

(Testimony of Helen Husted.)

I mean, [1515] not held out for a period of time because it never came back.

Q. Well, at any rate, as to the second copy, there were a number of instances where you didn't immediately replace it in the book, is that right?

A. On these few instances that show up here on our list, yes, they didn't—both copies did not go into the book there.

Q. The only instances where you didn't replace a second copy are the instances where they do not now appear in the book, is that it?

A. That's right.

Q. Now, you are saying that of your own personal recollection, is that right?

A. That's right.

The Referee: What is the answer, Mrs. Husted?

The Witness: That's right.

Q. Now, do you recall how many of these instances there were?

A. No, I can't tell you right off, Mr. Fisk.

Q. Well, do you recall with respect to what kind they were?

A. Well, I think you will—I know that they were all Schenley's.

Q. You know that they were all Schenley's.

A. Yes.

Q. In other words, you have learned since your last testimony that they were all Schenley's?

A. No, not since I last testified because I recall the correspondence in which Schenley's had asked for an extra copy.

(Testimony of Helen Husted.)

Q. And when did you last refresh your recollection on that [1516] correspondence or with respect to that correspondence?

A. I haven't refreshed by memory.

Mr. La Shelle: Now, just a moment, I object to that. The question assumes she has refreshed her recollection, which is something she hasn't said.

The Referee: She may answer.

A. I haven't refreshed my memory on it, Mr. Fisk.

Q. When did you last see the correspondence you had reference to?

A. I don't know that—it may be that the correspondence is in with the exhibits already in.

Q. Well, do you understand my question?

A. Yes, you asked me when.

Q. When did you last see it?

A. Well, I don't know.

Q. Well, have you seen it within the last three months?

A. I don't know that I have seen it in the last three months.

Q. You can't recall whether you have seen it in the last three months or not?

A. Well, I haven't had anything to do with Hedgeside's business for over a year.

The Referee: That's not the question, Mrs. Husted.

A. So I would have no opportunity to see any correspondence from them unless it would appear in the exhibits here.

(Testimony of Helen Husted.)

Q. Well, have you examined all of the Hedge-side-Schenley [1517] correspondence in the exhibits here? A. No.

Q. You have not? A. No, sir.

Q. Have you examined any of them?

A. In the process of working with them, yes.

Q. And you examined that since the last hearing?

A. I don't know that I have, sir. Since the last hearing?

Q. Yes.

A. I haven't seen any of the exhibits since the last hearing.

Q. Well, then, within the last two months have you examined them?

A. No, not individually.

Q. Well, by individually, do you mean alone or do you mean you haven't—

A. I mean that I haven't looked at every piece that's in the exhibits.

Q. But you have looked at some of them.

A. Only insofar as we were using them to check the exhibits against the list that Mr. La Shelle has set up for that period.

Q. And that you have done within the last two months, is that right?

A. Not individually. Not looking at every sheet.

Q. Well, then casually or generally you have done it within the last two months, is that right?

A. Not all of it, sir.

Q. Well, have you seen any of it, casually or

(Testimony of Helen Husted.)

otherwise, within the last two months?

A. Why surely, I had them on my lap here, checked them as [1518] Mr. La Shelle was asking me to identify them. Naturally, I looked at those.

Q. And that is the only time that you examined any of them in any way, is that right?

A. No, because I checked with Mr. La Shelle the exhibits and warehouse receipts against the list that he has.

Q. In other words, you went over that correspondence with Mr. La Shelle before you testified on the last case.

A. No, sir.

Q. You did not?

A. No, sir, not individually I did not.

Q. Well, did you go over it in any fashion?

A. With him here, yes, as I was testifying I went—I checked each one as I went along so I would know what to—so that I would know that I was identifying the right thing.

Q. But outside of in this courtroom, did you go over it with him in any fashion? A. No.

Q. With Mr. Ward or with anyone?

A. No, sir.

Q. You did not. A. No, sir.

Q. Nor Mr. Ward nor anyone else.

A. No, sir.

Q. Or anyone connected with Schenley's.

A. No, sir.

Q. So that the only time you recall seeing any of that correspondence was in this courtroom on the

(Testimony of Helen Husted.)

last occasion, except the time you saw them in the first instance, is that right?

A. I would say yes. [1519]

Q. Now, your recollection at the present time as to the copies that are missing, are based on your examination of that correspondence in this courtroom on the last occasion in which you testified, is that right?

The Witness: Will you repeat it again?

(The last question was read by the Reporter.)

A. You see, Mr. Fisk, I was not aware that those copies were not in the book until we made the check because after all, I've been away from the operation for over a year and unless you're working with these things every day, you soon—they soon go out of your mind, you know,—

Q. Well, now—

A. (Continuing) actively.

Q. You said until we made the check. When did you make the check and who is "we"?

A. Mr. La Shelle and I checked the exhibit material so that he could see which ones he wanted copies made of, you know, at the end of the last hearing.

Q. That was after you had examined them here in the courtroom. A. Yes.

Q. So that up until the time you examined that correspondence and these exhibits in the courtroom on the last occasion on which you testified, you did not know there were any missing.

A. I wouldn't say that I didn't know there were

(Testimony of Helen Husted.)

any missing because I don't consider them missing under those [1520] circumstances. The request was made for the copies or they would have been in the book and there was an order given through Mr. McMains to me that someone wanted those copies or they would have been there.

Q. In other words, it is your present recollection that all copies were replaced in the book in each instance except in the case of Schenley, that is, they were replaced immediately after typing, is that right?

A. Yes, sir, I would say that's right.

Q. You are not only talking about the warehouse receipt books that you have examined in this courtroom, but you are talking about all of the warehouse receipt books of the Hedgeside Distillery Corporation, whether they are involved in this proceeding or not, so long as they were kept by Hedgeside during the period from '45 to April, 1949.

A. I put them in there myself during the time I worked there unless I had instructions to do otherwise with them.

Q. Well, from whom would you get such instructions?

A. Mr. McMains.

Q. From Mr. McMains.

A. Uh-huh.

Q. And you have a recollection of having gotten such instructions on occasions, is that right?

A. Yes, sir.

Q. And in what connection did you get such instructions?

A. I don't remember right off, Mr. Fisk.

(Testimony of Helen Husted.)

Q. Did you get instructions in the case involved in this instance here where Schenley asked to have certain of the [1521] copies and never returned them?

A. But those were extra copies and if they needed them for their file. They only needed one for their file, actually, but we always made two and if they needed one extra one, it was easy to supply it.

Mr. Fisk: Well, I ask that the last answer go out.

The Referee: So ordered.

Mr. Fisk: Now, would you read the question back, Miss Reporter?

(The last question was read by the Reporter.)

Mr. Fisk: Do you understand the question?

A. Yes, I do. I had instructions from Mr. McMains on whatever I did in connection with the warehouse receipts.

Q. In other words, you never took any action in that respect without specific instructions.

A. No, sir.

Q. But do you have any definite recollection now as to whether Mr. McMains told you to turn over one of the copies of these warehouse receipts to Schenley?

A. Oh, it would go back to his desk, first. I wouldn't send it out directly together.

Q. Well, he just asked you to turn over the copies to him and you don't know what he did with it, is that right? A. No.

(Testimony of Helen Husted.)

Q. Well, what is——

The Referee: What's the answer?

The Witness: No. [1522]

Q. What is the answer.

A. If Schenley's made the request for an extra copy and it was right for them to have it, then that's probably where it went.

Q. But you don't recall Mr. McMains or anyone ever telling you to turn over any copies to anyone, is that right? A. No, sir.

Q. You do not. A. No, sir.

Q. But you do recall that on occasions you turned over copies to Mr. McMains, is that right?

A. Yes, sir.

Q. You don't know what he did with the copies nor why he asked for them, do you?

A. Not actually, but if he had a request for the copies from Schenley as we would assume under the circumstances where the receipt was made to Schenley in the first place.

Mr. Fisk: I ask that the last part go out.

The Referee: That may go out—the last part.

By the Referee: Q. Mrs. Husted, the fact is on some occasions you turned over one of the copies to Mr. McMains, isn't that true?

A. Yes, sir.

Q. As far as your assumption is concerned, we're not interested.

A. I'm sorry. I didn't mean to use the word.

Q. And from then on, as to what he actually

(Testimony of Helen Husted.)

did with it of your own knowledge, do you know?

A. No. [1523]

By Mr. Fisk: Q. Now, did you ever take these warehouse receipt books, or any of them, out of the vault and show them to anyone other than Mr. McMains? A. No, sir.

Q. Now, did you handle the Franciscan warehouse receipt books? A. Yes.

Q. In exactly the same manner as you handled the Hedgeside?

A. There are only two copies of the Franciscan receipts.

The Referee: You mean an original and a copy?

The Witness: Yes, sir.

Q. Original and one copy. A. Yes, sir.

Q. There is no extra copy. A. Yes, sir.

Q. The stubs you never filled out in any instances, is that right?

A. No, they were never used.

Q. Either the stubs that were attached to the pledge or the two copies.

A. They were never used.

Q. Were the copies ever signed?

A. Not that I know of.

Q. In other words, you just typed the original and the two copies and then the ones—the copies that were replaced, you replaced without any signatures or anything further being done to them other than the typing, is that right?

A. Yes, sir.

Q. Did you have anything to do with replacing

(Testimony of Helen Husted.)

the original when it was returned to Hedgeside?

A. Yes, sir. [1524]

Q. Will you tell us, mechanically, how you handled that event?

A. Well, they came to my desk from Mr. McMains. They were either cancelled out or one of the signatures torn out—voided, and they were put in the book where they belonged with scotch tape.

Q. In other words, you would receive the original from Mr. McMains. A. Yes, sir.

Q. And when you received the original, its condition was that it was either cancelled out or a portion of the signature torn off. A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. Now, what physical act had taken place with regard to the original which you referred to as cancelled out?

A. Well, perhaps Mr. McMains had written “cancelled” across the face of it.

Q. Well, you say “perhaps.” Is that your recollection that he did that?

A. Or he occasionally used a stamp too.

Q. Is that a rubber stamp? A. Yes.

Q. With the word “cancelled” written on it?

A. Uh-huh.

The Referee: Don't—

The Witness: Excuse me. I'm sorry. Excuse me.

Q. At any rate, the original warehouse receipt would be handed to you by Mr. McMains with those changes made on the face [1525] of it.

A. Yes, sir.

(Testimony of Helen Husted.)

Q. And you would then do what with it?

A. Re-insert it in the book at the proper number.

Q. With scotch tape? A. Yes, sir.

Q. Now, what did you do where there was a partial withdrawal?

A. Oh, those didn't come to me.

Q. In other words, take the case where an original warehouse receipt had been issued to me for a hundred barrels of spirits and then later I came in and withdrew fifty barrels, you don't know what was done with respect to that original warehouse receipt?

A. No, sir, that did not come to me.

Q. Well, my question is: Do you know what was done in that instance?

A. No, sir.

Q. You do not. A. No, sir.

Q. Well, now, do you recall on the occasion of your testifying here last you referred to the signature and the handwriting, or I believe the initials and the handwriting of Mr. McMains on the back of one of the warehouse receipts which had to do with partial cancellation?

A. Yes, sir.

Q. You have no personal knowledge of what took place there. You were simply identifying his handwriting, is that right?

A. That's right.

Q. You know nothing about the practice of Hedgeside in that regard.

A. No, sir.

The Referee: Mr. Fisk—recess? [1526]

Mr. Fisk: May I ask just one or two more on this?

Q. You did not replace the original of that

(Testimony of Helen Husted.)

warehouse receipt in the warehouse receipt book and issue a new one, did you?

A. I don't think that's the procedure.

Q. No, I am asking you if you did. I am asking you by your recollection if you did.

A. No.

Q. Your recollection is that you did not.

A. No.

Q. Now, these warehouse receipt books were available to you at all times, were they not?

A. Yes, sir.

Q. Do you recall any instances where that was done by anyone?

A. No, sir. You're talking about receipts on where there have been partial withdrawals.

A. That is right.

A. No, sir.

Q. In other words, there was no indication made in that book, the warehouse receipt book, that there had been any partial withdrawals?

A. No, sir, there is no record in the book that indicates that.

Q. In other words, whenever there was a partial withdrawal, nothing took place with respect to the warehouse receipt books or the copies in it whatsoever, is that right?

A. No, sir.

Mr. Fisk: That's all for the time being. [1527]

The Referee: Recess.

Mr. Fisk: I'm not finished with the witness.

(A brief recess was taken.)

The Referee: Very well, Mr. Fisk. You may proceed.

(Testimony of Helen Husted.)

Q. You mentioned Miss Wilcox as being a payroll clerk at one time for Franciscan?

A. Yes, sir.

Q. And that is the young lady who testified here in this case? A. Yes, sir.

Q. And did she have a place of business at Hedgeside—the same place as you did?

A. Yes, sir.

Q. It's Mrs.—not Miss, is that right?

A. Mrs. Wilcox.

Q. Her husband, was he an employee of Hedgeside? A. Before they were married.

Q. He wasn't an employee of Hedgeside after they were married?

A. I don't believe so, Mr. Fisk; I've forgotten just when he went off.

Q. What position did he hold with Hedgeside?

Mr. La Shelle: Your Honor, I fail to see—

The Referee: I don't even know.

Mr. La Shelle: Just a moment, I fail to see the materiality of the employment of Mrs. Wilcox's husband.

The Referee: Mr. Fisk?

Mr. Fisk: The materiality is I want to establish all the relationships and what this witness knows about what took place in connection—between the two [1528] firms—Franciscan and Hedgeside?

By the Referee: Q. Did he work in the office in either place?

A. Yes, sir, he worked for Hedgeside.

Q. In the office? A. Yes, sir.

(Testimony of Helen Husted.)

The Referee: You may answer. The objection is overruled.

By Mr. Fisk: Q. He was on the board of directors of Hedgeside, was he not?

A. Oh, I don't know that.

Q. Was he connected with Glaser Bros.?

A. I don't know that either.

Q. On each transaction, was there more than one warehouse receipt kept by Hedgeside — one warehouse receipt book kept by Hedgeside?

A. Not that I know of, Mr. Fisk.

Q. In other words, as to each transaction, that original warehouse receipt and the two copies were the only record that they had on the transaction, is that right? A. So far as I know.

Q. Were there any other copies made of the transaction except the two copies that you just testified with respect to?

A. Well, Mr. Fisk, now just when we were out for recess, I took a look at the letters of transmittal that have gone with the warehouse receipts and it shows that there were two copies of those receipts for which requests were made. It shows that [1529] two copies, in addition to the original, went to Schenley's.

Q. In other words——

A. So now may I explain to you how it happened? They got the original——

Q. Well, now wait just a minute. I don't think——

Mr. La Shelle: Just a moment, I think the witness can explain her answer.

(Testimony of Helen Husted.)

The Referee: Pardon me, Mr. Fisk. First of all, Mrs. Husted, you answer Mr. Fisk's present question and then I will permit you to clarify and explain your former answer.

Mr. Fisk: Well, then, may the last answer go out as not responsive to my question?

The Referee: So ordered.

The Witness: Now, will you read the question back again?

(The last question was read by the Reporter.)

A. Only in those instances which I want to tell you about.

Q. In other words, there were instances where the copies were made other than the two copies which went with the original warehouse receipt, is that right?

A. Yes, in these that I want to tell you about.

Q. All right, now what were the instances where there was a third copy made?

A. Mr. Fisk, in the letter of transmittal that goes with certain of these warehouse receipts, it shows that there were [1530] two copies sent to Schenley in addition to the original and those are those eleven or twelve or whatever it may be, because each letter of transmittal indicates that the extra copies were sent in those instances. Now, the one that went is the one that is missing or the two that went and the one that is missing out of the book, plus the information which went on a plain white sheet which made the second extra copy. Do I make it clear?

(Testimony of Helen Husted.)

Q. Well, I don't know that I understand it. Let me see if I do. In the eleven or twelve instances that you referred to with respect to the transactions with Schenley, there was made out by you an original warehouse receipt and two copies. Was there a third copy made out?

A. Plus a white one.

Q. Plus a white copy. A. That's right.

Q. Now, what was the form of the white copy?

A. It was just an 8½ by 10 sheet of paper.

Q. Just a letter sheet. A. That's right.

Q. And what was done with that?

A. That made the second copy. The second extra copy that had been requested.

Mr. Fisk: Well, I ask that that answer go out as not responsive.

The Referee: What happened?

Q. What was done with this white copy—this third copy which is on a letter sheet? [1531]

A. That and the pink or yellow one, whichever it is, that's missing and the original were put on Mr. McMains desk—the original for his signature and the disposition from then on.

Q. And you don't know what became of it after that? I'm talking about the letter-sized white copy.

A. It accompanied the letter and the other two copies which were transmitted with the letter.

Q. You made out the original and two yellow copies and the third white copy which was on a letter-sized sheet?

(Testimony of Helen Husted.)

Mr. La Shelle: I don't think they were both yellow; they were pink and yellow.

Q. Pink and yellow. You made out the original and the pink and yellow copy?

A. Uh-huh.

Q. And the white copy which was on a letter-sized sheet.

A. Uh-huh, that's right.

Q. Did all three of those copies, together with the original, go to Schenley?

A. No, sir.

Q. Did any of the copies—the three copies—remain at Hedgeside?

A. Yes, the one that's in the book.

Q. Which is which color?

A. Probably the pink one, as I recall. It's the yellow ones that are out. I'd have to look at the book to be sure.

Mr. Fisk: Your Honor, I would like to have the book, if I may.

The Referee: Surely. [1532]

(Discussion off the record.)

Q. Now, Mrs. Husted, I show you Petitioner's Exhibit No. 59, which is a warehouse receipt book containing, or which contained originally, warehouse receipt No. 3665-B, together with the two copies—the yellow and a pink copy. Now, is there an original of warehouse receipt 3665-B in that book?

A. No, sir.

Q. Is there a yellow copy?

A. No, sir.

Q. Is there a pink copy?

A. Yes, sir.

Q. Now, on the white stub, which is the stub for the original, is there any typing or writing or does

(Testimony of Helen Husted.)

anything appear there except the printed heading?

A. No, sir.

Q. And on the yellow stub there isn't anything even printed there? A. No, sir.

Q. And on the pink stub, what appears?

A. Just the printed information as is on the original.

Q. The same as on the original.

A. Uh-huh.

Mr. La Shelle: The original stub, you mean.

The Witness: The original stub, yes.

Q. That form is followed in all of the stubs in these various warehouse receipts.

A. Uh-huh.

The Referee: Yes, Mr. Husted?

The Witness: Excuse me—yes.

Q. Prior to the time that the pink copy was returned to the book, there was no way to tell what number those three stubs had reference to, was there? [1533]

Mr. La Shelle: Now, just a moment. I think we're getting into testimony—the evidence speaks for itself, your Honor, rather than have the witness interpret or read——

Mr. Fisk: I think it does from examining the book, but I am just following the continuity. It is preliminary to what I am going to——

The Referee: She may answer. You may answer, Mrs. Husted.

A. The pink copy was put in immediately after it was typed.

(Testimony of Helen Husted.)

Q. No, but prior to the time they put in the pink copy there isn't anything on those three stubs that would indicate that they referred to warehouse receipt 3665-B, is there?

A. No, but there was no appreciable length of time that elapsed.

Q. Now, do you know why nothing appears on the yellow stub? A. No, sir, I do not.

Q. There is no printed matter at all.

A. No, sir.

Q. You never formed a practice, however, of filling out the pink stub. A. No, sir.

Q. Or the white stub. A. No, sir.

Q. Did you have a practice of returning to the book the pink copy and not the yellow copy?

A. No, sir.

Q. You didn't have that practice?

A. No, sir.

Q. But in this particular instance and in others in the case of Schenley, you did follow that practice, is that right? [1534]

A. For the period that the procedure was set up.

Q. And what period was that?

A. I don't know. I would have to have the correspondence file to check.

Mr. La Shelle: Will you talk a little bit louder?

Q. Who set up the special procedure that you have reference to?

A. The client, I would assume, had set up the procedure in the first instance.

Q. In other words, in this particular instance

(Testimony of Helen Husted.)

that you have reference to as indicated by warehouse receipt 3665, Schenley set up the practice.

A. We have to go back to the correspondence, but I think you will find that's so.

Q. Did you receive your instructions from Schenley or did you receive them from someone else? A. Mr. McMains gave them to me.

Q. And he gave you specific instructions to handle that particular transaction in the way it was handled? A. That's right, sir.

Q. And he also gave you specific instructions to handle some ten or eleven others in a similar manner. A. Yes, sir.

Q. Were there any instances that you recall where that procedure was followed except those eleven or twelve? A. No, sir.

The Referee: Mr. Fisk, how much more time do you [1535] think you will take with Mrs. Husted?

Mr. Fisk: Not a great deal longer.

The Referee: It's a couple of minutes to twelve. I was wondering whether or not this would seem like you had reached a good dividing point.

Mr. Fisk: I have. May I ask two questions?

Q. Attached to Petitioner's Exhibit—I don't recall the number——

The Referee: 53, Mr. Fisk.

Mr. La Shelle: 53—part of 53.

Q. (Continuing): which has contained within it, warehouse receipt 3665-B, there is an original letter purporting to be from Hedgeside to Schenley dated December 2, 1948 and in the second paragraph of

(Testimony of Helen Husted.)

that letter, the following statement appears: "Yesterday, 100 barrels Hedgeside production, S/N 71852 to 71951, were moved down, and we are accordingly enclosing herewith our Non-negotiable Warehouse Receipt No. 3665 (with two copies) to cover." Now, did you type that letter?

A. If the initials on the bottom say "WSMH" I did.

Q. Indicating. A. Yes, sir, I did.

Q. And did you mail it?

A. I wouldn't know what—I don't know that I personally mailed this particular letter.

Q. You don't know whether there were any enclosures that went out with the letter or not of your own personal knowledge, do you?

A. No, at this time I couldn't say. [1536]

Q. Well, did you in the regular course of business, mail out these letters for Hedgeside?

A. Yes, sir.

Q. But you have no recollection as to whether or what enclosures there were with that letter when it went out? A. Not that particular letter.

Q. So you don't know what copies are referred to by Mr. McMains when he speaks of "with two copies" in that paragraph.

A. Yes; the yellow one and the white one.

Q. Well, if you have no present recollection on what went out with this, how can you say that?

A. Well, that's the copies he refers to in that letter.

(Testimony of Helen Husted.)

Q. Well, do you have any personal knowledge of what enclosures went out with that letter?

A. Not at that time, Mr. Fisk. It's too long.

Q. Then you don't know what two copies he's referring to.

Mr. La Shelle: Just a moment, we object to that as being argumentative, your Honor. She stated that that was the practice. Naturally, at this date she can't say what went out on a given letter; no one can say. But that was the practice.

Mr. Fisk: I don't think the witness has testified to that, your Honor.

The Referee: She may answer.

A. The procedure was for the copies mentioned in the letter to accompany the letter. I don't know whether they were with that particular letter or not now. [1537]

Q. The practice of Hedgeside was when the letter mentioned copies, the copies would be enclosed, is that correct? A. That's right.

Q. But you don't know what copies are referred to in this particular letter because you don't know what copies went out with the letter, isn't that true?

A. I don't know what copies went out with the letter but the copies, the yellow and the white and the original, should have been with the letter.

Q. And you say that because you know, you recall that that was a practice adopted by Hedgeside at that time, is that right? A. Yes, sir.

Q. Now, on December 2, 1948, how long had that practice been in effect?

(Testimony of Helen Husted.)

A. I don't know exactly, Mr. Fisk, but I think the first paragraph of the letter helps.

Q. Well, in other words, then it really wasn't a practice; it was an exception that was adopted on that occasion, isn't that true?

A. No, because it had continued for a little while. You see——

Q. All right. Looking at that letter, now, refresh your recollection as to how long that practice had been in effect.

A. All right. It says here: "We have now started transfer of your goods from IRBW 111 at Yountville to our IRBW 2. This is in accord with our letter of November 27, 1948." So the [1538] procedure was set up in that letter of November 27.

Q. Well, was this procedure only adopted in connection with the transfer of these goods from Franciscan's warehouse over to Hedgeside's warehouse? Is that the only occasion when that was done?

A. I don't know but that's what it looks like.

Q. Well, you don't know of your own knowledge.

A. No.

Q. You know nothing about whether or not that procedure had been previously used or not.

A. It hadn't been previously used.

Mr. Fisk: Your Honor, I guess I don't want to hold it up. I would like to finish, however, even this phase of it.

The Referee: Gentlemen, Mr. Walsh has in-

(Testimony of Helen Husted.)

formed me that it will be impossible for him to go on tomorrow morning.

Mr. Fisk: Your Honor, I called Mr. La Shelle and said it would be impossible for me to go on.

(Discussion off the record.)

Afternoon Session—2:00 o'clock p.m.

Cross-Examination—(Continued)

Mr. Fisk: Q. Mrs. Husted, still referring to warehouse receipt 3665-B, according to your best recollection, you made only three copies, is [1539] that right?

A. No, I'm not certain. On occasion there had been maybe another one or two.

Q. In other words, it is now your testimony that you may have made an original and four copies?

A. Yes, sir, I may have.

Q. On what do you base your recollection when you make that statement?

A. Well, I looked at that letter again and I see that there is another copy.

Q. You are now looking at the same letter I take it.

A. You and I are looking at the same letter. (Laughter) It says I did, doesn't it?

Q. In the third paragraph of that letter, which reads as follows: "In compliance with a request (and this is the letter of December 2, 1948 from Hedgeside to Schenley)—"in compliance with a request from Mr. Covert, we are sending him a copy of the warehouse receipt, together with copies of

(Testimony of Helen Husted.)

the bill of lading and a copy of this letter." Now, this letter is addressed to Mr. Baglin, is that right?

A. Yes, sir.

Q. And at the bottom it is indicated that a copy of this letter went to Mr. Covert?

A. Yes, sir.

Q. So that it is your testimony now that in addition to the original and two copies that went to Mr. Baglin, there was still another copy that went to Mr. Covert.

A. Yes.

Q. Is that correct? A. Yes. [1540]

Q. Do you have any independent recollection on that or did you just read this paragraph at the noon hour and figure that that was the only way your testimony could be reconciled, is that right?

A. No, sir. I'm just recalling again this letter would indicate that there was another copy, too. I don't remember whether we made four—exactly whether we made four or three, but the letter would indicate that there were four.

Q. Well, now, you look at the letter and tell me the basis of your statement that it would indicate there were four copies instead of three.

A. Well, the original is—it says here that with the non-negotiable warehouse receipt number so and so is here. That takes the two copies.

Q. It doesn't say what the two copies are though, does it? A. No.

Q. So that the two copies that are referred to could be the yellow and pink then as far as that letter is concerned.

A. No, sir.

(Testimony of Helen Husted.)

Q. Isn't that correct?

A. No, sir, it could not be, no, sir; the pink copy is in the file.

Q. And what is there in that letter that would indicate to you that the yellow and the pink copy were not sent with the original?

Mr. La Shelle: Your Honor, I object to that as argumentative. [1541] The letter speaks for itself. The pink remaining in the books speaks for itself and they're in evidence.

The Referee: The objection is overruled. The letter does not speak for itself. It says copies. You may answer, Mrs. Husted.

A. Well, there is nothing in the letter that indicates which copies went.

Q. In other words, from looking at the letter, there is nothing there to indicate but that there were three copies made, is that right?

A. Four here.

The Referee: Did you understand Mr. Fisk's question?

The Witness: Well, he says three copies but there were four.

The Referee: But I want you to hear the question.

(The last question was read by the Reporter.)

Q. Only three copies made.

A. No, it isn't right.

Q. You don't agree with it. A. No.

Q. All right, now, you refer me to the statements

(Testimony of Helen Husted.)

in that letter that indicate that four copies were made instead of three.

A. All right. It says "enclosing herewith are non-negotiable warehouse receipt No. 3665" (that's the original); in brackets "(with two copies) to cover." Those go to Mr. Baglin. [1542] Then the next paragraph says: "In compliance with the request from Mr. Covert, we are sending him a copy of the warehouse receipt."

Q. Now, what is there in that letter to indicate that the two copies that went with the original to Mr. Baglin were not the yellow and pink copy?

A. There is nothing in the letter.

Q. All right. The third copy you said was on a white, plain letter sheet, is that right?

A. Yes, sir.

Q. And so was the fourth copy.

A. The fourth copy too.

Q. Was there a fifth copy?

A. I think not.

Q. You're not sure though.

A. No, not at this stage I can't be.

Q. Now, how did you make up those copies?

A. Original and then the carbons.

Q. You used carbon paper? A. Uh-huh.

Q. And——

The Referee: Pardon me, Mr. Fisk. Had you finished your answer?

The Witness: Well, I could add a little bit to it.

The Referee: Well, you finish your answer.

A. (Continuing): You see, Mr. Fisk, we didn't

(Testimony of Helen Husted.)

have any other just printed—with the printed name on it, so we had to substitute just plain, white sheets of paper and, of course, when you turn a letter-size sheet of paper to use it from top to [1543] bottom, makes it easier crosswise, is just the size of the warehouse receipt, so it worked out pretty nicely.

Q. In other words, these warehouse receipts, the portion that you tear off, is approximately $8\frac{1}{2}$ by 11, is that right? A. Yes, $8\frac{1}{2}$ by 11.

Q. All $8\frac{1}{2}$ by 11.

A. Yes, I think is standard.

Q. In other words, you used, in making these up, you took the original and you used the pink copy and the yellow copy and two white ones and the plain, white letter sheet.

A. That's right, sir.

Q. And four pieces of carbon paper.

A. Uh-huh.

Q. Is that right? A. Uh-huh.

The Referee: Yes or no. Is that right?

Mr. La Shelle: She's trying to figure it out.

The Referee: Yes, but she shook her head and the court reporter doesn't get that weaving and bobbing.

The Witness: Sure.

Q. That's right. A. Sure.

Q. You're sure of that.

A. Sure. Four pieces of carbon to make five copies.

Q. And that's your best recollection.

A. Yes.

(Testimony of Helen Husted.)

Q. Now, I show you Petitioner's Exhibit 59 and the pink copy No. 3665-B and ask you to read into the record what you typed on that sheet.

Mr. La Shelle: Well, your Honor, again I object to this and I voice the objection that Mr. Fisk has made [1544] when I have asked somewhat similar questions. The book is in evidence and what is printed and what is typed can be seen; it doesn't need the aid or interpretation of the witness.

The Referee: He didn't say that, Mr. La Shelle; he just asked the witness to read into the record the part that she typed on that particular page. Now, that's all she's got to say. If she didn't type any, she can say "nothing"; if she typed certain words, she can testify. Did you understand Mr. Fisk's question?

The Witness: What I typed.

The Referee: Well, the answer of what you typed on there.

A. The date, December 1, 1948, Schenley Distillers Corporation, 850 Battery Street, San Francisco, California; the word "whiskey" is crossed out.

Q. The word "whiskey" is printed though.

A. Yes.

Q. And you have got some typewritten X's, is that right?

A. Yes, to strike it out. The Mountain View IRBW 111, 100 barrels spirits grain produced by Hedgeside Distillery Corporation S/N 71852-71951, 5,108.88 OPG.

Q. Then some dashes?

(Testimony of Helen Husted.)

A. Yes, to fill out the line. Then down in the lower part of the receipt there's a place for storage and the typewritten material is .10 per bbl, then the word "per" is printed; then typewritten "month."

Q. But you didn't type the word "per."

A. No.

Q. You just wrote the word "month."

A. That's right, sir.

Q. The word "from" is printed; you didn't type that either.

A. No, sir. Typed the word "date."

Q. Now, that's all that you typed, is that right?

A. No, here is another line.

Q. All right.

A. The word "handling" is printed.

Q. And you didn't type that.

A. No, sir. And then I did type .25. The word "per" is printed and I didn't type it; bbl is typewritten.

Q. Now, that's all that you typed, is that right?

A. Uh-huh.

Q. And that's all that was on these two white copies.

A. Yes, sir.

Q. And that's all that went to Mr. Covert.

A. No, the letter says there is other material that went to Mr. Covert.

Q. Well, I mean as far as the copy of the warehouse receipt is concerned.

A. Yes, sir.

Q. Do you know where those two white copies are now?

A. Oh, no.

Q. Do you have the receipts?

A. No, sir.

(Testimony of Helen Husted.)

Q. And as a matter of fact, you don't know whether they [1546] ever were delivered or not, do you? A. Naturally not.

Q. Do you know what the purpose was of sending that white copy to Mr. Covert?

A. No, except that he requested it.

Q. Well, do you know that he requested it of your own knowledge?

A. I think the letter says that he requested it.

Q. You are referring to the third paragraph of the letter of December 2, '48. A. Yes, sir.

Q. That's the only knowledge you have with regard to it. A. Yes, sir.

Q. And do you know why the third white copy went to Mr. Baglin in addition to the yellow copy?

A. No, sir.

Q. Nor do you know what he did with it.

A. No, sir.

Q. And you don't have any recollection—any personal recollection at the present time as to when this pink copy was replaced in the books, do you? I am talking about your present personal recollection.

A. Well, the procedure was to put it in immediately after it was typed.

Mr. Fisk: I ask that the answer go out.

The Referee: So ordered.

A. I do not.

Q. You do not. Is that your answer?

A. (Witness nods affirmatively.) Yes, sir. [1547]

Q. What was the maximum combined salary that

(Testimony of Helen Husted.)

you received at any one time from Hedgeside and Franciscan per month?

A. Two Hundred and Fifty Dollars.

Q. And at the time you received a total of \$250 from the two institutions, how much did you receive from Franciscan and how much from Hedgeside?

A. I believe the split was \$200 from Hedgeside and \$50 from Franciscan. The payroll record would show.

Q. At one time it was Twenty-five from Franciscan and One Hundred and Seventy-five from Hedgeside.

A. Yes, sir.

Q. Beside keeping the warehouse receipt books of Franciscan, what other services did you render Franciscan?

A. I did the stenographic services for them, made out the water bills and government correspondence. That's about all.

Q. What did you do for Hedgeside?

A. Oh, I did all the stenographic work for Hedgeside.

Q. And did you do all the stenographic work for Franciscan?

A. Yes.

Q. And what else did you do for Hedgeside?

A. Well, there were five men in the Hedgeside office, you see, and I did the stenographic work—the clerical work too, as a matter of fact, for all of them.

Q. How many men were there at Napa connected with Franciscan?

A. Well, only Mr. Stone.

(Testimony of Helen Husted.)

Q. Mr. McMains had nothing to do with Franciscan?

A. With Franciscan? No, that isn't right. He did some [1548] things for Franciscan.

Q. Did Mr. Logan have anything to do with Franciscan? A. He was an officer.

Q. Well, was he an officer of Hedgeside?

A. Yes.

Q. Was Mr. McMains an officer of Hedgeside?

A. Yes.

Q. Well, didn't you have the same—What about Mr. Roberts, was he connected with Franciscan?

A. For a little while.

Q. Was he connected with Hedgeside?

A. Yes, sir.

Q. Well, didn't you have all five men that were connected with Hedgeside also connected with Franciscan?

A. No, not at the same time. I mean, they're separate, you know.

Q. Wasn't Stone at all times connected with both Hedgeside and Franciscan while you were there? A. Yes, that's right.

Q. And wasn't Logan in the same position?

A. Yes, that's right, too, but Mr. Logan wasn't active in Franciscan. I mean, active, you know, about Mr. Logan as being with Franciscan.

Q. Didn't you just testify the other day that he signed some of the warehouse receipts?

A. Yes, sir.

Q. Then he was active, is that right?

(Testimony of Helen Husted.)

A. Yes, but not—the balance of his attention was in Hedgeside—most of it was for Hedgeside.

Q. Now, Mr. McMains, wasn't he active with Franciscan?

A. Yes, he was active with them, but the activity in [1549] Franciscan was somewhat compared to the activity in Hedgeside.

Q. Was there anybody in the office there at Hedgeside that didn't do work for Franciscan?

A. Yes.

Q. Who?

A. The person who kept the Hedgeside government records when we had a government record clerk and the——

Q. Well, wasn't that you—didn't you do that?

A. No, sir, I did not.

Q. At no time did you keep at Hedgeside, the government records?

A. No, sir, not those daily reports.

Q. Didn't you just a few minutes ago testify that you kept some of Hedgeside's government records?

A. No, not Hedgeside—not the daily and monthly production records.

Q. Never did you keep any of those records?

A. No, sir.

Q. For either Franciscan or Hedgeside?

A. No, sir.

Q. Well, now, what is today the last person you have reference to?

A. We at one time had a man who did nothing

(Testimony of Helen Husted.)

but the daily and monthly government production records—warehouse records.

Q. What was his name?

A. Robert Benning.

Q. And he did nothing but the government records for Hedgeside. A. Hedgeside.

Mr. La Shelle: Just a moment, your Honor. I fail [1550] to see the materiality of this or that it is proper cross-examination.

The Referee: Well, Mr. La Shelle, I'm just anticipating that Mr. Fisk is trying to see that the same employees were with Hedgeside that were with Franciscan.

Mr. La Shelle: What has that got to do with this case?

Mr. Fisk: It has got a lot to do with it.

The Referee: Well, I have an idea as far as the law point is concerned, when the briefs are filed, but at the moment I certainly am not going to preclude Mr. Fisk from getting an answer.

Mr. La Shelle: There is no affirmative defense pleaded or alter ego.

The Referee: That's still a law point.

Mr. La Shelle: But the law point is clear; it's got to be pleaded.

The Referee: You're still entitled to, when eventually the Court makes an order, you're entitled to review my decision and so is Mr. Fisk and so is Mr. Walsh, but certainly, I am not going to shut out any testimony.

Mr. La Shelle: Well, the rule is, your Honor, as

(Testimony of Helen Husted.)

pointed out before, if they plead it, then they can go along those lines, but here they're not pleading it and they're not pleading it for a very good reason, [1551] because they know if it's once brought out in the open——

The Referee: Well, then you can find the Court in error in permitting the witness to answer. The objection is overruled.

Mr. La Shelle: Well, as a matter of fact, I think we did have a stipulation at one time that objections to that line of testimony could be reserved. It's all right if that applies, but I don't want to have any implication in this record that I have waived any objections to the various objections and motions that have been made in this case that the bank and the trustee have no right to go into any alter ego defense in view of the fact that they have not pleaded it as an affirmative defense.

The Referee: As far as the Court is concerned, whether you had a stipulation along those lines or not, you can always point out that the Court was in error in permitting the witness to answer those questions, even if you had the stipulation.

Mr. La Shelle: Well, I doubt if I have that right if I haven't objected.

The Referee: Well, your objection has been made and the Court overruled the objection.

Mr. La Shelle: Well, then, may it be understood so that I don't take up a lot of time, that any question along those lines may be deemed to be objected to, either [1552] that or I am going to object to

(Testimony of Helen Husted.)

every question from here to Christmas and I am not going to waive anything along those lines and I want the record to be abundantly clear on that point.

Mr. Fisk: If the Court please, we have argued at great length and even briefed it to the Court and counsel the question of the affirmative defense and the Court has ruled on it and Schenley has argued that they have certain rights based on the Heaven Hill whiskey that came through a chain of title that may not be, in my opinion, established and as I understand arguments of counsel, he must establish it or he has a burden of proof and any witness put in the proof in order to establish it and I submit that there are questions raised here with regard to that question under 3440 and other provisions which would permit us to go into that question and I doubt that chain of title and we are not required to do it by way of affirmative defense and in addition to that, we do have an affirmative defense and so does the trustee.

The Referee: And in addition to that, the Court has ruled.

Mr. Fisk: That's correct.

The Referee: You may have an answer to your question.

Mr. La Shelle: Well, I take it that I'll have to object to each question to preserve my record because [1553] they do not care to join in that stipulation.

Mr. Fisk: I don't know what the stipulation is. We had the stipulation and the Court ruled on it.

(Testimony of Helen Husted.)

Mr. La Shelle: Yes, but it has been months since the stipulation was made and I want it to be very clear it will apply to this witness as well as the witness that was on the stand while that stipulation was made. We are not giving anything up by it.

Mr. Fisk: Your Honor, I have no idea of taking up the time of the Court by forcing counsel to make a lot of unnecessary or repetitious objections. On the other hand, I don't want to stipulate with counsel that——

Mr. La Shelle: Today is Monday, or Tuesday.

Mr. Fisk (Continuing): ——that he's got to make an objection to everything that conceivably might give rise to error in this proceeding regardless of whether he has objected to it or not. It seems to me his position on that question is clear and if it's a question of—our position is clear and if it's a question of his objecting to a particular line of questions at a particular time, I'm perfectly willing to stipulate, but just to put in a blank stipulation that any objection he could have made at any time in this proceeding, I don't think that should be asked.

Mr. La Shelle: I asked that any testimony utilized for the alter ego defense be deemed objected to.

Mr. Fisk: That's your statement—that this is limited to alter ego.

The Referee: Now, wait a minute, gentlemen. Give the court reporter a break, too.

Mr. La Shelle: Mr. Fisk, I really did not expect the stipulation. I'll make my objections from here until Christmas. That's what we're going to

(Testimony of Helen Husted.)

do because I am not going to waive that and you are trying to jockey me into a position of waiving a right and I am not going to do it.

Mr. Fisk: I am not trying to jockey you because I don't think I could if I tried, so I'm willing to proceed.

The Referee: The Court has overruled Mr. La Shelle's objection.

(The last question was read by the Reporter.)

Q. He did nothing but government records, is that right?

Mr. La Shelle: We object to that, your Honor, upon the grounds it is incompetent, irrelevant and immaterial and not covered by the pleadings in this case and that it tends to invoke the alter ego defense without it having been affirmatively pleaded.

The Referee: Overruled.

A. He had other duties, Mr. Fisk, but I can't give them in detail at this time.

Q. He performed work for both Hedgeside and Franciscan, [1555] did he not? A. No, sir.

Mr. La Shelle: Just a moment. Wait a minute. I move to strike out the answer subject to making an objection, your Honor.

The Referee: Overruled.

Mr. La Shelle: Well, can't I even have the objection?

The Referee: I say, your objection has been made and I have overruled your objection.

Mr. La Shelle: I made a motion to strike out

(Testimony of Helen Husted.)

the answer so I could get the objection in. She answered before I could object.

The Referee: Very well.

Mr. La Shelle: We make the same objection as heretofore noted, your Honor.

The Referee: And the same ruling. Now, do you want the former answer to stand or if you want to answer over, you may have your choice.

A. No, sir.

Q. Didn't you testify this morning that he received compensation both from Hedgeside and Franciscan?

Mr. La Shelle: We make the same objection, your Honor.

The Referee: Same ruling.

A. I think I'm the only person who appeared on both of those payrolls in that particular manner.

Q. Didn't you testify this morning that Mr. Benning received compensation from both Hedgeside and Franciscan?

A. No, sir.

Mr. La Shelle: Please! We move to strike out the answer, your Honor, until we get an objection in.

The Referee: And you make the same objection.

Mr. La Shelle: Please, will you wait; on every single one of these questions is probably going to be objected to.

The Witness: All right, Mr. La Shelle.

Mr. La Shelle: We make the same objection.

The Referee: Same ruling. Overruled. Now, you may answer.

A. No, sir.

(Testimony of Helen Husted.)

Q. According to your present recollection, did he or did he not receive compensation from both Hedgeside and Franciscan?

Mr. La Shelle: Wait a minute. The same objection, your Honor.

The Referee: Same ruling.

A. No, he didn't.

Q. When did you first go on the payroll of Franciscan?

The Referee: Mr. La Shelle, we don't want to shut you out.

Mr. La Shelle: I have no objection.

A. When I went to work?

Q. When you went to work for Franciscan.

A. For Hedgeside.

Q. In other words, you went to work for Hedgeside in 1945 and at the same time that you went on the payroll of Hedgeside, you went on the payroll of Franciscan, is that right?

A. Yes, sir. May I tell you why?

Mr. Fisk: Well, I don't think that's material.

The Referee: Well, as far as the Court is concerned, you may answer the question completely.

A. (Continuing): There was a ceiling on salaries at the time I went up there and you could only hire up to a certain level and my asking salary was above that level so in order to equalize the services and give me what I asked for, I was paid out of both companies.

Q. I see. In other words, when you went to Hedgeside in 1945, they had a ceiling on employing

(Testimony of Helen Husted.)

a person in the category they employed you and they could only pay One Hundred and Seventy-five and you asked more so Mr. Stone arranged for you to get some compensation from Franciscan and some from Hedgeside, is that right?

A. For a certain amount of duties that I was to perform for Franciscan.

Q. I see. Did Mr. McMains keep the books of Hedgeside? A. Yes, sir.

Q. And he also kept the books of Franciscan?

A. No, sir.

Q. He didn't keep any of the books of Franciscan? [1558] A. No, sir.

Mr. La Shelle: We make the same objection, your Honor.

The Referee: Overruled.

A. No, sir, their operations are separate. The books are separate; the files are separate.

Mr. Fisk: I ask that that last statement go out as voluntary.

The Referee: That may go out.

Q. When you went with Hedgeside, who was the bookkeeper there at Franciscan?

Mr. La Shelle: We make the same objection, your Honor.

The Referee: Overruled. Mrs. Husted?

A. I'm thinking. I don't really remember right off.

Q. How many bookkeepers did Franciscan have while you were connected with Hedgeside?

(Testimony of Helen Husted.)

Mr. La Shelle: Just a moment. We make the same objection.

The Referee: Overruled.

A. There were four or five just in the time I was there.

Q. Do you remember the names of the book-keepers?

Mr. La Shelle: We make the same objection, your Honor.

The Referee: Same ruling.

A. You're talking about Franciscan. [1559]

Q. That's right.

A. Well, Mrs. Wilcox was the last one. I guess they worked backwards.

Q. When did she——

The Referee: Now, just a minute. Let's have an answer to the question. You said there were four or five. You said "I think they worked backwards" and you named Mrs. Wilcox.

A. And Margaret Corbett.

The Referee: Q. Is that Corbett C-o-r-b-e-t-t?

A. I think so. I think Robert Benning worked on them, too. Then Mrs. Wilcox before him again.

Q. She was there and left and then came back.

A. (Witness nods affirmatively.) I can't remember who was there before her.

Q. Your best recollection now is Wilcox, Benning, Corbett, and Mrs. Wilcox again.

A. Uh-huh.

Q. Is that right? A. Yes, sir.

The Referee: Mr. Fisk?

(Testimony of Helen Husted.)

Mr. Fisk: That's all.

The Referee: Mr. Walsh?

Mr. Walsh: I have no questions, except I want the record to show that I ask that the cross-examination made by Mr. Fisk be considered that of the trustee.

The Referee: Mr. La Shelle? [1560]

Mr. La Shelle: Yes, just a couple of questions here.

Redirect Examination

Mr. La Shelle: Q. Have you a recollection as to the practice that you followed in putting back the printed copies of the warehouse receipts in the warehouse receipt books after you typed them up?

A. Well, Mr. La Shelle—

Q. Have you a recollection or haven't you?

A. Yes.

Q. Yes, all right. And what was your practice in putting back the duplicate printed copy, that is, the pink and the yellow slip where you put both of them back or in special instances such as you testified awhile ago where you only put one of them back, how soon after you typed them up did you put them back? A. Immediately.

Mr. La Shelle: That's all.

The Referee: Q. Mrs. Husted, what do you mean by immediately? Does that mean within the hour or within the day or within the next couple of days?

A. No, within a few minutes because after all it

(Testimony of Helen Husted.)

was my duty to keep that file current and those went in immediately afterwards.

Q. There is another question I'd like to ask you. With reference to that letter sheet copy of the warehouse receipt, as I understand it, the pink and the yellow and the original all had certain printed information on them. [1561] A. Yes, sir.

Q. Did the white extra copy that you sent in these eleven or twelve instances that you referred to, have any information other than the carbon copy information that went on——

A. No, sir, they were just plain sheets of paper to start out with.

Q. There was no printed matter.

A. No, sir.

Q. And the only information that went on that completely white sheet was a copy of the information that went on to the pink and the yellow and the original printed forms. A. That's right.

The Referee: Thank you, Mrs. Husted.

Recross-Examination

Mr. Fisk: Q. Were any of the copies signed? Were the yellow copies signed?

A. Not that I know of, Mr. Fisk. I would have to check them through to be sure.

Q. And the two letter copies were not signed.

A. No, sir.

Q. You testified in response to Mr. La Shelle's question as to the procedure that you followed—as to your duties with respect to the procedure in re-

(Testimony of Helen Husted.)

placing these copies in the warehouse receipt books and I ask you who assigned your duties in that connection. A. Mr. McMains.

Q. Mr. McMains. A. Uh-huh. [1562]

Q. And what did he state to you?

A. Well, I don't know how he put it in the first place.

Q. Well, you were keeper, so to speak, of these warehouse receipt books, were you not?

A. As they were considered file material, yes.

Q. And——

The Referee: Just a minute, Mr. Fisk. So the record will be clear, this witness previously testified that the warehouse receipt books were in the safe and that she did not have the combination, so we must be fair with the witness.

Q. Do you recall the testimony that the Court has just referred to that you gave this morning?

A. Yes.

Q. Now, will you state to the Court as nearly as you can recall what your duties were with respect to these warehouse receipt books?

A. Well, I prepared the warehouse receipts with the number of copies that were necessary and after I had finished that and taken the original and whatever copies Mr. McMains needed and given them to him, I inserted the file copy or copies, whichever it might be, in the book, put them in there with scotch tape and then took the book and put it back in the vault.

(Testimony of Helen Husted.)

Q. Now, did you have any other duties with respect to the warehouse receipt books whatsoever?

A. No, sir.

Q. And you performed all of those duties on the express instructions of Mr. McMains?

A. Yes, sir. [1563]

Q. Did you have charge of the filing of these warehouse receipt books in the safe or the vault?

A. Yes, sir.

Q. And if anyone came there and wanted to see these books, did you handle that?

A. Yes, sir, I went to get them if the request was made of me.

Q. And you received your instructions in that regard from Mr. McMains?

A. Yes, sir, if he wanted them, yes, sir.

Q. And what were his instructions specifically?

A. Well, if he wanted any particular—the copy of a particular warehouse receipt he would say “I would like the copy of that particular receipt.”

Q. In other words, he would do that, is that right?

A. He would ask me to get it for him.

Q. I see. And you would only get it upon his request.

A. That's right.

Q. And the only instances in which he ever requested it of you were these eleven or twelve instances in the case of Schenley.

A. Oh, no. He might want some other receipt that went in those books.

Q. Well, then there were other instances besides

(Testimony of Helen Husted.)

the Schenley instance when you removed copies from the book, is that right?

A. No, that isn't what you asked me before.

Q. Well, I am asking you that now. Were there other instances besides the eleven or twelve instances in the case of Schenley where on the request of Mr. McMains you removed copies from the book?

A. Oh, I don't know about that now. There may have been instances.

Q. In other words, there may have been other instances where copies were taken out of the book other than the Schenley instances, is that right?

A. Perhaps so. Perhaps so.

Q. You say "perhaps so." Do you have any recollection one way or the other now on the circumstances?

A. No, sir, not at the moment.

Q. If I said to you that there are many copies missing from the various warehouse receipt books of the Hedgeside Distillery Corporation, would that in any way affect your testimony or your recollection?

Mr. La Shelle: Just a moment, we object to that on the grounds it's improper cross-examination if there was something, why then what would your answer be.

The Referee: Sustained.

Q. Have you made any recent examination of the warehouse receipt books here?

A. Only when I checked with Mr. La Shelle, but

(Testimony of Helen Husted.)

no overall examination. I would have no occasion to make one.

Q. Well, during the noon hour today did you look through [1565] any of these warehouse receipt books? A. No, sir.

Q. After all of the whiskey or spirits behind one of these warehouse receipts had been removed from the warehouse, I believe you said the original was either marked cancelled or the name torn off and returned to you and you pasted it back in the book, is that right?

A. I would have no way of knowing whether all the material had been removed. What I said, Mr. Fisk, was that when Mr. McMains had finished making his record of whatever removals or cancellations were made, he gave the receipt—the original receipt back to me and asked me to put it in the book. Then, so far as coverage is concerned, I wouldn't have anything to do with that.

Q. You never at any time knew whether there was any spirits or whiskey behind any of the warehouse receipts that you typed up, did you?

A. No, that had nothing—that wasn't in my—

Q. That wasn't among your duties to obtain that information? A. No, sir.

Q. Now, you did say though that when Mr. McMains brought a cancelled original back and handed it to you, you pasted it in the book.

A. That's right.

Q. But you don't remember whether or not he

(Testimony of Helen Husted.)

always did that as soon as the whiskey or spirits had been removed from the warehouse.

A. I couldn't say when he did it.

Q. In other words, there may have been instances where [1566] whiskey or spirits were removed from the warehouse and the original information returned to the book, isn't that right?

Mr. La Shelle: Just a moment, your Honor, we object to that as not proper cross-examination. The lady said that when——

The Referee: Well, she said she didn't know. The objection is sustained.

Mr. La Shelle: She didn't know.

Q. And I show you Petitioner's Exhibit 59 for Identification which is——

Mr. La Shelle: In evidence. My records show 59 was in evidence.

Mr. Fisk: Well, it was for identification if it is in evidence.

The Referee: In any event, the witness is going to look at a warehouse receipt that is a part of Exhibit 59.

Mr. Fisk: Correct.

Q. And the number of the warehouse receipt is 3355-B and you do not see the original in the book, do you? A. No, I do not.

Q. And you do not see the yellow copy.

A. No, sir.

Q. And does that purport to be a warehouse receipt issued to Schenley? A. No.

Q. And you do not know whether the eighty-four

(Testimony of Helen Husted.)

barrels covered by that warehouse receipt of whiskey are presently in [1567] the warehouse or not?

Mr. La Shelle: Well, we object to that, your Honor. This witness has already stated that she did the clerical work or filling out what was done; she knows nothing about what was done with the receipt.

Mr. Fisk: She still can answer that question, your Honor.

The Referee: Do you know?

A. I do not.

Q. And the yellow copy is not there either.

A. The yellow copy of the receipt is not there.

Q. Do you have any recollection of sending that yellow copy to the American Trust?

A. I can't tell you now, Mr. Fisk.

Q. And what is your recollection with regard to the practice of Hedgeside while you were there with respect to customers other than Schenley? Did you follow the same practice?

A. I don't know what the practice was in this case.

Q. Well, I am not asking in that case; I am asking you what the work or practice was at Hedgeside with respect to customers other than Schenley. Was it the same as with Schenley?

A. Not necessarily. Whatever the deal was with the other client.

Q. I see. In other words, you removed all copies from the warehouse receipt book according to the

(Testimony of Helen Husted.)

special deal with the particular customer, is that right? [1568]

A. No, according to whatever instructions Mr. McMains gave me.

Q. Well, it varied with customers.

A. I presume it did vary with customers.

Mr. Fisk: That's all.

Mr. La Shelle: That's all.

The Referee: Thank you very much, Mrs. Husted. You're excused. * * * * * [1569]

ARTHUR E. LEITHMAN

called as a witness on behalf of the respondent, Anglo California Bank, being first duly sworn by the Referee, testified as follows:

The Referee: Q. What is your full name? [1574]

A. Arthur E. Leithman.

Q. And the spelling? A. L-e-i-t-h-m-a-n.

Q. Where do you reside? A. Oakland.

Q. Do you have a street address?

A. 2437 East 26th Street.

Mr. Walsh: East 26th Street?

The Witness: Yes.

The Referee: Very well, Mr. Fisk.

Direct Examination

Mr. Fisk: Q. Mr. Leithman, by whom are you employed at the present time?

A. The Anglo California National Bank, San Francisco.

(Testimony of Arthur E. Leithman.)

Q. You are employed at the main office?

A. Main office.

Q. 1 Sansome Street.

A. 1 Sansome Street.

Q. In what department are you employed with that institution? A. In the note department.

Q. How long have you been in that department?

A. About thirty years.

Q. Do you know Richard I. Stone?

A. Yes.

Q. About how long have you known Mr. Stone?

A. I would say about twenty-five years.

Q. Do you know of any business transaction between the Anglo Bank and the Hedgeside Distillery Corporation? A. Yes.

Q. And have you had to do with any of those transactions? [1575] A. Yes.

Q. I take it from your statement that you have been in the note department for some thirty years that you were handling that department in the years '47 and '48, is that correct? A. That's correct.

Q. During that time, did the bank carry on a practice of lending money to the Hedgeside Distillery Corporation and taking as security, warehouse receipts? A. Yes.

Q. With Hedgeside. A. Yes.

Q. And you handled those transactions, did you, during that period? A. I did.

Q. State generally how they were handled?

A. Well, Mr. Stone would come in the morning, bringing the warehouse receipt, tell me he wanted so

(Testimony of Arthur E. Leithman.)

much money; the warehouse receipt was covering so many cases or barrels of whisky or liquor and he would give me a value and we would loan him so much of the value, pre-arranged, before.

Q. Would he execute any documents?

A. Yes, he would execute the promissory note there.

Q. Covering the amount?

A. Covering the amount that we would loan him covered by the warehouse receipt.

Q. And then how was the amount of the loan advanced to Hedgeside?

A. By crediting to his commercial account.

Q. When you say "his," you are referring to the—— [1576]

A. To the Hedgeside, I should say.

Q. Mr. Leithman, I show you a group of three documents, one of them purporting to be a non-negotiable warehouse receipt of the Hedgeside Distillery Corporation and numbered 3469-B and the other one a promissory note to the Anglo Bank purporting to be executed by the Hedgeside Distillery Corporation and then a pencil or rather an ink memorandum. I ask you if you ever saw those documents before? A. Yes, I have.

Q. Calling your attention to warehouse receipt 3469-B, do you recognize the signature placed under the name Hedgeside Distillery Corporation on that document? A. I do.

Q. Whose signature is it?

A. It's A. H. McMains.

(Testimony of Arthur E. Leithman.)

Q. Are you familiar with that signature?

A. I am.

Q. By whom does it purport to be counter-signed?
A. By R. I. Stone.

Q. Are you familiar with Mr. Stone's signature?

A. I am.

Q. And do you recognize that as a signature?

A. I do.

Q. Will you state when you received this document and the circumstances under which you received it—this warehouse receipt—when you first received it?
A. June the 19th, '47.

Q. June the 19th, 1947?
A. Yes.

Q. And it was handed to you by whom? [1577]

A. By Mr. Richard Stone.

Q. By Mr. Stone.
A. Yes.

Q. What did you do upon his handing you that document and what did he request of you and what did you do?

A. He requested that I make a loan on the security covered by the warehouse receipt, which I did.

Q. Then what did you do with respect to any note to evidence that loan?

A. Well, the note was put through and kept through on our records.

Q. And did you make a note out on the form of the bank?

A. Yes, on the form of the bank and he signed and sealed.

Q. You handed it to Mr. Stone and he signed and

(Testimony of Arthur E. Leithman.)

sealed. And is this promissory note before you the note that was executed at that time?

A. Not at that time. This is a renewal of the note.

Q. A similar note to that but different in amount and date was executed by Mr. Stone at the time of receipt? A. That's right, yes.

Q. And then from time to time payments were made and renewal notes were executed.

A. That's correct.

Q. Until at the present time there is outstanding the promissory note before you now, is that right? A. That's right.

Q. With a balance due of \$7,980, is that right?

A. That's right. [1578]

Mr. La Shelle: \$7,980?

Q. And what is the date of that note?

A. The date of the note is January 14, 1949.

Q. And it is executed by whom?

A. By R. I. Stone.

Q. On behalf of whom?

A. On behalf of Hedgeside Distillery.

Q. Now, what is this note attached?

A. Well, that was just for convenience so we could trace down the notes on account of so many renewals, that's all.

Q. That is a history of the notes executed in connection with the pledge of that warehouse receipt, is that correct? A. That is right, yes.

Q. What was the amount of the loan when the warehouse receipt was first received?

(Testimony of Arthur E. Leithman.)

A. \$10,500.

Q. Do you have any permanent records of the bank with you that will show the date on which that amount was advanced to the Hedgeside Distillery Corporation? A. We have ledger sheets.

Q. Is this—

A. That is right here (indicating)—Ten Thousand, Five Hundred on that date.

Q. What is the card you have in your hand?

A. That is the ledger sheet of the Hedgeside Distillery account. [1579]

Q. The ledger sheet kept by whom—by what institution?

A. By the Anglo California National Bank, note department.

Q. Is that a permanent record of the Anglo Bank? A. That is a permanent record.

Q. And kept in the regular course of business?

A. That is right.

Mr. Fisk: Now, your Honor, I would like at this time to offer these documents in evidence.

Mr. La Shelle: Could I just ask a couple of questions at this time of the witness that I don't quite understand? May I just see that for a moment?

Mr. Dinkelspiel: May I interrupt for a moment and ask counsel if they expect to reach Mr. Glaser this morning? If not, we would like to return to San Francisco. We are both busy.

Mr. Fisk: I don't think—I am going to put in seven more of these documents. Unless Mr. La

(Testimony of Arthur E. Leithman.)

Shelle's cross-examination will be protracted and I don't see why it will, I'll then take on Mr. Glaser. I would say in a half an hour; that would be my guess. Now, Mr. La Shelle can change that.

Mr. La Shelle: Well, I don't know exactly. You haven't finished yet. I'll have some cross-examination. It's eleven o'clock now.

Mr. Dinkelspiel: Well, you have one hour before noon. I don't know how late the Court will run beyond [1580] twelve. I'm not trying to——

The Referee: Twelve, Mr. Dinkelspiel.

Mr. Fisk: I will say, if it will convenience you and Mr. Glaser, why as far as I am concerned, you can bring him back here at two o'clock, but this is a preliminary matter I have to put in.

Mr. Dinkelspiel: I understand that. I am not trying to interfere in any way but I just thought we could save——

Mr. Fisk: If that is agreeable with Mr. La Shelle and the Court.

Mr. La Shelle: My guess would be that if we reach Mr. Glaser this morning, it will be so close to noon it won't make much difference.

The Referee: As far as the Court is concerned, I would have no objection to an early adjournment if we ran into that proposition. Mr. Walsh, how do you feel?

Mr. Walsh: That's satisfactory to me.

(Discussion off the record.)

The Referee: Mr. Dinkelspiel, you and your client and Mr. Jaffa are excused until two o'clock.

(Testimony of Arthur E. Leithman.)

Mr. Dinkelspiel: Thank you. I suppose these records are safe **here**.

The Referee: The courtroom will be locked.

(Discussion off the record.)

Mr. La Shelle: I just wanted to clear up something [1581] in my notes.

Mr. La Shelle: Q. This note, I take it, is a renewal note executed on January 1, '49?

A. Executed on January 14. That was the date that the interest was——

Q. In other words, the note was executed January 14, 1949 retroactively to January 1, 1949.

A. That's right.

Q. So this is not the original note——

A. Oh, no, no.

Q. And what was done with the original note or notes?

A. Well, they are the property of the borrower when they are renewed.

Q. I see. However, although the original note and any renewals that might have been between the original note and this note, while they are not here, the history of those notes, the amounts of them and any payments that might have been made on them are contained on either this second sheet——

A. There is a memorandum with each note.

Q. And they can also be traced on the ledger, can they not?

A. Also be traced on the ledger card.

Q. Now, where did you say the original note was?

(Testimony of Arthur E. Leithman.)

A. It was given back to the borrower.

By Mr. Fisk: Q. The original note was given back to the borrower and all of the intervening renewal notes were returned to the borrower, [1582] is that right? A. That's right.

Mr. La Shelle: So the history there can be traced.

Mr. Fisk: Yes.

Q. Mr. Leithman, since you received this warehouse receipt under date of June 19, 1947, has its possession always been with the Anglo Bank?

A. This note?

Q. Yes. A. Yes, it has always.

Mr. Fisk: Any objection to the offer, Mr. La Shelle?

Mr. La Shelle: None whatever.

Mr. Fisk: Your Honor, I have photostatic copies for Mr. La Shelle, but to save time, I'll arrange it afterwards.

The Referee: Very well. Warehouse receipt No. 3469-B, note dated January 14, 1949, signed by Hedgeside Distillery Corporation, by R. I. Stone in the sum of \$7,980 and ink notation memorandum — the three documents will be Respondent Bank's Exhibit No. 4. Interest and principal liability ledger sheet, Hedgeside Distillery Corporation, with posting dates from June 5, 1947 to June 20, 1947, Respondent Bank's Exhibit No. 5. And on the reverse of the ledger sheet, the posting dates are from June 20, '47 to July 8, '47.

Mr. Walsh: What is that again?

(Testimony of Arthur E. Leithman.)

The Referee: June 20, 1947 to July 18, 1947. And [1583] the Court is returning Exhibits No. 4 and No. 5 to Mr. Fisk who will furnish counsel and the Court with photostatic copies.

(The documents referred to were received by the Referee and marked "Respondent Bank's Exhibits No. 4 and 5," respectively.)

Mr. La Shelle: Fred, may I ask this? I notice there is another ledger sheet here against two warehouse receipts. I was under the impression that the ledger No. 5 covered all of these. Apparently, there is a ledger, too. There is a supporting document to various warehouse receipts sometimes there being one ledger to a warehouse receipt and sometimes there will be no warehouse receipts.

Mr. Fisk: No question there were many other transactions.

Mr. La Shelle: Yes, I understand that. In other words, this is somewhat like my supporting documents.

Mr. Fisk: That's right.

Mr. La Shelle: In that they were sometimes bunched together.

Mr. Fisk: That's right.

Mr. La Shelle: I see, so that this is a similar setup as Exhibits 4 and 5, except in this instance there are two warehouse receipts to one ledger sheet.

Mr. Fisk: That's correct. [1584]

Mr. La Shelle: I see. I was under the impression that that ledger sheet covered all of them.

(Testimony of Arthur E. Leithman.)

Mr. Fisk: No.

Mr. La Shelle: I didn't examine it closely.

Q. Now, Mr. Leithman, I show you a second group of documents which consist of Hedgeside Distillery warehouse receipt 3470-B dated July 17, 1947, purporting to be non-negotiable and that document is signed by whom?

A. By A. S. McMains and counter-signed by D. F. Logan.

Q. And you are familiar with the signatures of both of those individuals? A. I am, yes.

Q. And that document was presented to you by Mr. Stone in the same way? A. That's right.

Q. That warehouse receipt No. 3469-B was, is that right? A. That's correct.

Q. And advances made against it in the same manner. A. In the same manner.

Q. And a note executed by Mr. Stone in the same manner. A. That is right.

Q. I also show you warehouse receipt 3470-B, dated July 30, 1947 and that is signed and counter-signed by whom?

A. By A. H. McMains and counter-signed by D. F. Logan.

Q. And that warehouse receipt was received by you in the same way? A. That's correct.

Q. As 3469-B, is that right? A. That is correct.

Q. And a note was executed by Mr. Stone to cover the advances [1585] made.

A. That is right.

Q. For which that warehouse receipt was

(Testimony of Arthur E. Leithman.)

pledged, is that right? A. That is right.

Q. And then there are two ink memoranda attached to these notes setting forth the history of the original note and the renewals and the balance do just as in the first instance, is that right?

A. That is right, yes.

Q. Then there is attached what purports to be a ledger card of the Anglo Bank for Hedgeside Distillery Corporation and will you point out on that ledger card the entries showing the original advances when these two warehouse receipts were turned over to the bank?

Mr. La Shelle: May I just take a look at something there for a moment, Fred?

Mr. Fisk: Surely.

Mr. La Shelle: I might call your attention, Fred, that on the schedule the date of that warehouse receipt is given as June 17, 1947 but it is actually July. You called it right.

A. There are two entries here covering each note—for each note.

Q. Would you read those entries? What was the first entry? A. 20,820.

Q. And that was the amount advanced by the Anglo Bank to the Hedgeside Distillery Corporation when it received which warehouse receipt? Give the number. A. 3470-B. [1586]

Q. And what was the date of that entry on the ledger card of the advance? On the ledger card, what is the date of the entry?

A. July 18, 1947.

Q. Now, with regard to warehouse receipt

(Testimony of Arthur E. Leithman.)

3472-B, what is the amount that was originally advanced against that warehouse receipt and the date as shown from the ledger card?

A. July 30, '47, \$3,000.

Mr. La Shelle: Three Thousand?

The Witness: \$3,000.

Q. Now, what are the present balances due on those two advances?

A. On the warehouse receipt of 3472, the note balance now is \$3,000 and on 3470 the note balance \$19,470.

Q. And you received on behalf of the bank these two warehouse receipts from Mr. Stone on the dates indicated at that time credits were made in the ledger, is that correct? A. That's right.

Q. And since that time, they have at all times remained in the possession of the bank and pledged with the bank. A. They have.

Mr. Fisk: I would like to have these——

The Referee: As one exhibit, Mr. Fisk?

Mr. Fisk: Yes.

The Referee: The documents just referred to by Mr. Fisk will be Bank's Exhibit No. 6 and the same ruling with reference to the withdrawal of the original [1587] documents.

Mr. La Shelle: There are two notes there, aren't there?

The Referee: Well, I can call off the documents. There is a note dated January 14, 1949 in the sum of \$3,000, an ink memorandum, warehouse receipt No. 3472-B, a note dated January 14, 1949 in the sum of \$19,470 signed by Hedgeside Distillery Cor-

(Testimony of Arthur E. Leithman.)

poration, by R. I. Stone, another ink memorandum, warehouse receipt 3470-B, ledger sheet, Hedgeside Distillery Corporation, interest and principal liability ledger, from July 18 '47 to August 22, 1947.

Mr. La Shelle: There is also a white sheet there, an ink sheet of the history.

The Referee: There are two of them, Mr. La Shelle.

Mr. La Shelle: Oh, two.

Mr. Walsh: Will you please read the dates?

The Referee: The ledger sheet?

Mr. Walsh: Yes, please.

The Referee: The postings go from July 18, 1947 to August 22, 1947.

(The documents referred to were received by the Referee and marked "Respondent Bank's Exhibit No. 6.")

Q. Mr. Leithman, I show you a third group of documents, which include a warehouse receipt of Hedgeside Distillery, No. 3474-B, dated September 10, 1947, a promissory note in the [1588] principal amount of \$3,000 dated July 14, 1949 and an ink memorandum, a warehouse receipt of Hedgeside No. 3475-B dated September 16, 1947, a promissory note to the Anglo Bank in the principal amount of \$6,000 dated January 14, 1949 and an ink memorandum; a warehouse receipt No. 3476-B of Hedgeside, dated September 16, 1947, a promissory note to the Anglo Bank in the principal amount of \$6,000 dated January 14, 1949 and an ink memorandum, and then a ledger sheet of the Anglo Bank covering the Hedgeside Distillery Corporation with posting dates

(Testimony of Arthur E. Leithman.)

running from August 22, 1947 through October 7, 1947. Now, referring to warehouse receipt 3474-B, that document is signed and countersigned by what persons?

A. By A. H. McMains and R. I. Stone.

Q. Respectively. A. Respectively.

Mr. La Shelle: Is that 72 you are referring to?

Mr Fisk: 74—3474.

Q. Warehouse receipt 3475 was signed and countersigned respectively by whom?

A. A. H. McMains and Henry A. Robert.

Q. And warehouse receipt 3476 was signed and countersigned respectively by whom?

A. By A. H. McMains and Henry A. Robert.

Q. The said three promissory notes are each signed by whom?

A. By Hedgeside Distillery, R. I. Stone as president.

Q. You recognize all of those signatures? [1589]

A. Yes, I recognize all of those signatures.

Q. Now, examine the ledger card and state when those warehouse receipts were originally turned over to you and the original notes executed and the amount of the advance by the bank to Hedgeside.

A. 3476-B, September 17, 1947, and the amount advanced \$6,000.

Q. What is the present balance due?

A. The present balance is Six Thousand.

Q. And has that warehouse receipt at all times since you originally received it been in the possession of the bank and pledged against the balance due from Hedgeside?

(Testimony of Arthur E. Leithman.)

A. It has. Warehouse receipt 3475-B, September 17, '47, \$6,000, and the present balance is still Six Thousand. Warehouse receipt 34——

Q. Just a minute. That warehouse receipt has at all times been in the possession of the bank and pledged against the balance due by Hedgeside since you originally received it, is that right?

A. Yes. Warehouse receipt 3474, September 10, '47 for \$3,000 and the balance is still Three Thousand.

Q. And the same thing is true with regard to the possession of it. A. Yes.

Q. The pledge, is that right?

A. That is right.

Mr. Fisk: I would like to have these in evidence as one exhibit.

The Referee: The previous mentioned documents all [1590] as one exhibit, Respondent Bank's Exhibit No. 7, and may also be withdrawn.

Mr. La Shelle: I take it they are withdrawn to be——

The Referee: Photostat copies to be furnished to counsel and the Court.

(The documents referred to were received by the Referee and marked "Respondent Bank's Exhibit No. 7.")

Q. Mr. Leithman, I show you a group of documents consisting of Hedgeside warehouse receipt 3477-B, dated October 23, '47, promissory note to the Anglo Bank in the principal amount of \$6,000 dated January 14, 1949, ink memorandum and ledger sheet of the Anglo Bank covering the Hedge-

(Testimony of Arthur E. Leithman.)

side Distillery Corporation's account, bearing posting dates running from October 7, 1947 to November 18, 1947. I ask you how warehouse receipt 3477-B is respectively signed.

A. A. H. McMains and R. I. Stone.

Q. Is it A. H. or W. S.?

A. I thought it was A. H.—W. S. McMains.

Q. You recognize that as his signature?

A. Yes, that's his signature.

Q. You have his signature card?

A. We have a copy of his signature on the card.

Q. And how is it counter-signed?

A. R. I. Stone.

Q. Will you state when you received that warehouse receipt, [1591] how much money the bank advanced to Hedgeside in connection therewith?

A. Received the warehouse receipt on October 22, '47 and we advanced \$6,000 and the present balance is still \$6,000.

Q. Does an entry appear?

A. An entry appears.

Q. On the ledger card? A. That's right.

Q. What date? A. October 22, '47.

Q. In what amount? A. \$6,000.

Q. And since you originally received this warehouse receipt, it has at all times remained in the possession of the bank?

A. It has all the time.

Q. And there has at all times been a balance due the bank from Hedgeside and that document has been held in pledge against it, is that right?

A. That's correct.

(Testimony of Arthur E. Leithman.)

Q. In all respects, this transaction and all of the other transactions were handled as you have outlined with the original transaction mentioned here, is that right? A. That's correct.

Mr. Fisk: I offer this in evidence.

The Referee: Respondent's Exhibit No. 8 consists of an ink memorandum, a note dated January 14, 1949 in the amount of \$6,000, warehouse receipt 3477-B and ledger sheet commencing October 7, 1947 and final entry October 7, 1947.

Mr. Walsh: What was the first date, your Honor?

The Referee: Pardon me. October 7, '47 to November [1592] 18, 1947, Respondent Bank's Exhibit No. 8. Also may be withdrawn and photostatic copies substituted.

(The documents referred to were received by the Referee and marked "Respondent Bank's Exhibit No. 8.")

Mr. Fisk: In order to shorten the examination, your Honor, I have three groups here; I'll present them all together.

Q. I have here, Mr. Leithman, three groups of documents which I will read out in their respective order: Warehouse receipt of Hedgeside Distillery Corporation No. 3548-B dated December 17, 1947, promissory note to the Anglo Bank in the principal amount of \$6,000 dated December 27, 1948, ink memorandum regarding the history of said note and renewals and ledger sheet of the Anglo Bank covering Hedgeside Distillery Corporation and bearing postings running from November 24, 1947

(Testimony of Arthur E. Leithman.)

through January 6, 1948, warehouse receipt 3652-B of Hedgeside dated September 16, 1948, promissory note to Anglo Bank, principal amount of 42,253 dated December 20, 1948, ink memorandum showing history of the renewals, ledger sheet of Anglo Bank covering Hedgeside Distillery Corporation bearing postings from September 13, 1948 to October 8, 1948, Hedgeside Distillery Corporation warehouse receipt No. 3689-B, dated January 5, 1949, promissory note to the Anglo Bank in the principal amount of \$18,130, dated January 6, 1949, two ink memoranda covering the renewal history and ledger sheet of Anglo Bank bearing postings between dates April 30, '48 and April 29, '47—

Mr. Walsh: You say, the ledger sheet—Did you just describe the ledger sheet now?

Mr. Fisk: Doesn't sound right, does it?

Mr. Walsh: No.

Mr. Fisk: I may be a little mixed up here. Just a minute. Let's see if we have got the wrong note with the wrong ledger sheet.

(Discussion off the record.)

Q. All right, I show you warehouse receipt 3652-B and ask you whose signatures appear respectively thereon.

A. R. I. Stone and D. F. Logan.

Q. R. I. Stone as the—

A. Counter-signed by D. F. Logan.

Q. R. I. Stone for whom?

A. For the Hedgeside Distillery.

Q. And D. F. Logan?

A. Counter-signed.

(Testimony of Arthur E. Leithman.)

Q. When did you receive that warehouse receipt?

Mr. La Shelle: Is this 3548 or——

A. This is 3652. We received this warehouse receipt on September 17, 1948 and it was for \$42,253 and the balance is still the same.

Q. \$42,253 the bank advanced Hedgeside upon receipt of that warehouse receipt?

A. That is correct.

Mr. La Shelle: Now, I may have my notation wrong, but I have the note of 3652 was \$4,253.

The Witness: Forty-two Thousand. [1594]

Mr. La Shelle: Oh, Forty-two Thousand what?

The Witness: Two Hundred and Fifty-three Dollars.

Mr. La Shelle: Slight difference. (Laughter).

Q. That warehouse receipt since you originally received it has at all times been in the possession of the bank and pledged against the bank as the balance due by Hedgeside.

A. That's correct.

Q. Now, look at the warehouse receipt of Hedgeside No. 3548-B and tell me whose signatures appear thereon.

Mr. La Shelle: 48.

Mr. Fisk: 3548.

A. It's W. S. McMains for the Hedgeside Distillery and counter-signed by R. I. Stone.

Q. And when was the warehouse receipt originally received by the Anglo Bank?

A. That warehouse receipt was received by the bank December 18, 1947. A \$6,000 note was ad-

(Testimony of Arthur E. Leithman.)

vanced on that date and the balance is still Six Thousand.

Q. Six Thousand was advanced. And a note signed to evidence it. A. Yes.

Mr. La Shelle: The balance is still Six Thousand.

The Referee: The answer is yes, Mr. Leithman?

The Witness: Oh, pardon me. Yes.

Q. And that warehouse receipt has at all times subsequent to that time remained in the possession of the bank. A. It has. [1595]

Q. And pledged against the balance due by Hedgeside, is that right? A. That is right.

Mr. Fisk: I think that I will close that with that exhibit because this goes outside of the Heaven Hill whisky.

Mr. La Shelle: That's 3548 you just offered.

The Referee: I'll give you the complete lineup——

Mr. Fisk: For the purposes of the record, I would state because I have already referred to this, I am offering the papers that accompanied warehouse receipts 3548 and——

The Referee: 3652.

Mr. Fisk (Continuing): 3652. For the time being, I'll hold in abeyance the warehouse receipt 3689-B and accompanying papers as they go to a different transaction.

The Referee: Very well. Warehouse receipt No. 3548 and accompanying documents and warehouse receipt 3652 and accompanying documents will be Respondent Bank's Exhibit No. 9.

(Testimony of Arthur E. Leithman.)

Mr. La Shelle: In other words, the two warehouse receipts will be combined.

The Referee: Yes.

(The documents referred to were received by the Referee and marked "Respondent Bank's Exhibit No. 9.")

Q. Now, Mr. Leithman, referring to warehouse receipt 3689-B, [1596] that is signed and counter-signed respectively by whom?

A. R. I. Stone for the Hedgeside and Henry A. Robert, counter-signed.

Mr. La Shelle: Roberts and who?

The Witness: Henry A. Robert.

Mr. La Shelle: And who is the other one?

The Witness: And R. I. Stone.

Q. When did you first receive that warehouse receipt? Strike that out. What is the date of the warehouse receipt, Mr. Leithman?

A. January 6.

Q. What year? A. 1949.

Mr. Walsh: Did you say January 6?

The Witness: Yes.

Q. Now, according to your records, when did you first receive that warehouse receipt?

A. According to our records, we first received that warehouse receipt on January 6.

Q. What year? A. '49.

Q. And you made what advances to Hedgeside upon receipt of that warehouse receipt?

A. Well, we made—for that warehouse receipt we made an advance of \$18,130.

(Testimony of Arthur E. Leithman.)

Q. And was a note executed for it?

A. That is correct, yes.

Q. And is that the note that you have before you now that was originally executed? [1597]

A. No, that was a renewal.

Q. That's a renewal note. And the memorandum, ink memoranda you have will show the history of the renewal.

A. That's right.

Q. What is the date of the note you presently have before you?

A. January 6, 1949.

Q. And what is the balance due on that note?

A. \$18,130.

Q. Now, show me on the ledger card where that advance is upon the ledger?

A. (There was no answer.)

Q. Mr. Leithman, do we have the wrong ledger card?

A. No, we have not. This note here was a renewal—this is a little difficult for me. This comprises the three notes one for 4305, 3325 and one for Ten Thousand Five Hundred and of this 4305 and 3920 came in here originally on May 3, 1947 and I think was with some other warehouse receipt and they were withdrawn and goods put in this warehouse receipt and a new note was made covering these notes here.

Q. So that it is your recollection from the examination of the documents before you that this warehouse receipt was a renewal warehouse receipt for other security.

A. I'm quite sure it was, yes.

(Testimony of Arthur E. Leithman.)

Mr. Fisk: Well, your Honor, we'll have to check that to run that down further. Frankly, I didn't notice that. That's all at this time.

Mr. Walsh: Are you offering those in evidence?

Mr. Fisk: No.

The Referee: Pardon me, Mr. La Shelle. Mr. Fisk, you say that's all at this time. You are asking for an opportunity to check.

Mr. Fisk: That's right.

The Referee: Now, after you do make a further check with reference to the documents that you have in your hand and that you have not offered, are you reserving the right to call the witness back?

Mr. Fisk: Yes, I would like to.

The Referee: Do you have any objection to that, Mr. La Shelle?

Mr. La Shelle: None whatever, your Honor. I think Fred will find that putting this stuff in is not quite as easy as it looks.

The Referee: And with that understanding, can Mr. La Shelle go ahead with his cross-examination?

Mr. Fisk: Do you want to adjourn?

Mr. La Shelle: I'll go right ahead. I have a few questions here and I'll take it out of order if it's all right with everyone else.

Cross-Examination

By Mr. La Shelle: Q. Mr. Leithman, in the note department there at the bank during the time

(Testimony of Arthur E. Leithman.)

of these transactions, were you in charge of the department?

A. No, I was not in charge of the department.

Q. What is your——

A. I am a note teller.

Q. A note teller? And I take it that in these transactions which you have been discussing here on the stand that you personally did not make the determination as to the value of the warehouse receipts nor as to the amount to be loaned against them.

A. No.

Q. Do you know who made that decision?

A. Well, I would say the loaning officer.

Q. The loaning officer? A. The loan officer.

Q. And it's true, is it not, that Bill White was the man at the bank generally in charge of the Hedgeside account.

A. It's true.

Q. And what is Bill White's capacity with the bank?

A. Vice-president.

Q. And when Stone came in there with a warehouse receipt, anyone of these that you have discussed, and the loan of X dollars was made, who gave you your instructions as to the amounts and so forth?

A. Well, that was all pre-arranged that the price would be a certain amount and I would loan a certain percentage.

Q. In other words, they would—somebody there at the bank would agree that the whisky was roughly of the value of X dollars and then that the

(Testimony of Arthur E. Leithman.)

loan would be such and such a percentage of X dollars. A. That's right.

Q. You would never lend the full amount. [1600]

A. Oh, never.

Q. And could you just explain to the Court here just how you got those instructions? In other words, did somebody tell you orally or were you given a memorandum, a slip of paper, or what?

A. No, it was primarily orally, that Stone would be in from time to time and if Mr. White or the loaning officer wasn't there why to take these figures and loan him so much and then it would be okayed after the loaning officer—if the loaning officer was there, Stone would go to the loaning officer and then they would present it to me.

Q. In other words, the loaning end of the bank, so to speak, the loan part, or I don't know what you would call it, they would make that determination. A. Oh, yes.

Q. And then you would carry out ministerially what they told you to do. A. That is correct.

Q. So that you had no discretion as to how much to loan. A. No, never.

Q. Or anything of that nature. A. No.

Q. And you had nothing whatsoever to do with the credit rating of the borrower as to whether or not he was a good risk.

A. I had nothing whatsoever to do with that.

Q. Your functions were ministerial.

A. That's all.

Q. Now, I think that you stated that you were

(Testimony of Arthur E. Leithman.)

familiar with the various signatures here that appear on the warehouse [1601] receipt of the signature, counter-signature and I take it that as is customary with the bank, there were on file little printed cards filled out with signatures.

A. That's right.

Q. And do you know whether or not during the times in question, Hedgeside had a commercial account with the bank? A. They had, yes.

Q. And then all the signatures would check against that commercial account would be on file.

A. We have it on file.

Q. Now, I think you mentioned Stone, McMains, Roberts, and Logan as the various officials who signed these warehouse receipts. Were all of their signatures on file or just some of them?

A. We had them all.

Q. All of the four gentlemen I mentioned.

A. That is right.

Q. And in checking these warehouse receipts at any time before taking the stand here today, did you compare those signatures with the signature cards on file? A. No.

Q. You never did. A. Not me.

Q. Has there ever been any question in your mind up to the present time as to whether any of those signatures were forgeries? A. Never.

Q. You are satisfied that they are genuine signatures. A. (Witness nods affirmatively.)

The Referee: What is the answer? [1602]

The Witness: Yes.

(Testimony of Arthur E. Leithman.)

Q. Now, I understood you to say correctly, did I not, that when these loans were made, cash or check wasn't given to Stone; it was credited to his commercial account.

A. Always credited to his commercial account.

Mr. Walsh: Commercial account of Hedgeside, not his.

Q. I mean of Hedgeside. A. Yes.

Q. And did you perform that function yourself or did you pass that on to somebody else?

A. Well, I made the credit and entered it in his book but then I passed on the books to the regular bookkeeper-clerks.

Q. In other words, another party in the bank would perform the ministerial act of entering the credit on his commercial checking account.

A. Oh, yes.

Q. And with reference to the renewals of these notes, as well as the original notes, I take it that your testimony is the same with reference to them, that you purely performed the ministerial act.

A. Oh, yes.

Q. Of doing it and had nothing to do with the discretion of the bank in making the loan in the first instance and the renewals as well.

A. Yes.

Q. So that the loan department, usually Bill White, handled that. A. That's correct.

Q. And I take it that you didn't have anything to do with any other security that Hedgeside may have had to the bank, such [1603] as a chattel mort-

(Testimony of Arthur E. Leithman.)

gage or a deed of trust or anything of that nature.

A. No, no.

Q. Now, with reference to these exhibits that are here, on all of the exhibits that have gone in here marked by the Court, taking the one that has 3548, warehouse receipt, Bank's Exhibit No. 9, there is referred in the record here an ink history or memoranda on a kind of a white card piece of paper and in each instance they give the history of the original note and their subsequent renewals, right?

A. The history of the individual note, yes, right up to the time it began until the present time.

Q. Did you make those out?

A. Some. I didn't make all of them. I made some. But I got help in making them.

Q. And this one, for example, is that your handwriting?

A. No, sir, that is not my handwriting. None here today were in my handwriting.

Q. Pardon?

A. None of these exhibits today were in my handwriting.

Q. Do you know when these were made out?

A. Well, I couldn't say exactly when but when the attorney asked for the detail of the company why then it was easier to trace it down. This was the more convenient——

Q. In other words, these would normally not be kept.

A. Oh, no, no, they are not a record of the bank.

(Testimony of Arthur E. Leithman.)

It's just convenience's sake so that I can identify them. [1604]

Q. Just convenience.

A. To help everyone.

Q. To help everyone here in this litigation.

A. There have been so many renewals, yes.

Mr. La Shelle: That's all the questions I have, your Honor.

The Referee: Mr. Walsh?

Mr. Walsh: I have no cross-examination, your Honor.

The Referee: Mr. Fisk, now to help to witness——

Mr. Fisk: I have one document I'd like to introduce.

Mr. La Shelle: I take it, Mr. Fisk, with reference to those ink memoranda that weren't kept in the regular course of business that you checked those and vouch for their accuracy, do you not?

Mr. Fisk: No, sir, I have not.

The Witness: Well, the ledger sheet—it follows the ledger sheet.

Mr. La Shelle: Summary of the ledger sheet?

Mr. Fisk: Is it a summary of the ledger sheet as introduced here?

The Witness: Yes.

Mr. Fisk: All of the information that is contained there can be checked against the ledger sheet.

The Witness: Yes.

(Testimony of Arthur E. Leithman.)

Mr. Fisk: I have no objection to your marking that [1605] document for identification.

Mr. La Shelle: No, I just assumed that you checked it.

Mr. Fisk: No.

Mr. Walsh: Mr. Fisk, are you going to introduce this in evidence now?

Mr. Fisk: Yes.

Mr. Walsh: I would like to make this statement, if your Honor please, that it will be understood that this will not bind the trustee in any way in any other proceeding. That is following the stipulation we had originally, Mr. Fisk, that any controversy between the trustee and the Anglo Bank as to title has been reserved so I want it understood that this will not in any way bind the trustee.

Mr. La Shelle: Well, I certainly won't join in any such stipulation.

Mr. Fisk: We have a stipulation that is already in the record, Mr. Walsh. That is about the determination of the respective position of the bank and the trustee. I don't know why this document should be in any different position. I mean, everything I am offering here I would say is subject to that stipulation.

Mr. La Shelle: Well, I would like to call the Court's attention to that and according to your petition, you don't have any such stipulation at all.

The Referee: Well, Mr. Walsh's statement wouldn't affect you in any way. I just wanted to know whether or not he was going to be bound by

(Testimony of Arthur E. Leithman.)

this document in other proceedings. Schenley would not even be concerned about an agreement between Mr. Walsh and Mr. Fisk.

Mr. La Shelle: No, but there was a reference made here that there was a stipulation as to the position of the trustee and the bank as to this particular proceeding and I am not a party to any such stipulation.

Mr. Walsh: We know that.

The Referee: They understand that.

Mr. Fisk: My position, in response to you, Mr. Walsh, is simply that I wouldn't want to stipulate with the trustee that any document duly executed and in the hands of the bank shall have no effect on the position of the trustee.

Mr. Walsh: I'm asking the fact that this document will be introduced in evidence at this time without any objection of the trustee will not be considered a document that later on the trustee cannot object to.

Mr. Fisk: As I understand our stipulation, there is a stipulation in his record already that there will be a subsequent opportunity or a subsequent hearing in which both the bank or the trustee may present such evidence as they may have to determine their respective positions with regard to this liquor, but at [1607] this time we are addressing ourselves to the petition of Schenley.

Mr. Walsh: That's all I want to know, Mr. Fisk. In other words, you are confining the introduction of this document solely to the issues raised

(Testimony of Arthur E. Leithman.)

on the petition for reclamation filed by Schenley.

Mr. Fisk: At this time.

Mr. Walsh: At this time. What do you mean at this time?

The Referee: He means that he will be afforded an opportunity to make an offer of it at which time if you deemed to have a good objection, he may enter his objection, is that correct?

Mr. Fisk: I mean, if I have a controversy with the trustee about our relative position, I don't want to foreclose myself from offering any document of any kind.

Mr. Walsh: That's understood. I understand that.

The Referee: But Mr. Walsh doesn't want to automatically be able to offer it just by reason of the fact that it has been received in evidence in this proceeding.

Mr. Walsh: Without objection.

Mr. Fisk: That's agreeable to me. You may make such objection that you see fit.

By Mr. Fisk: [1608] Q. Mr. Leithman, I show you what purports to be a general pledge agreement addressed to the Anglo California National Bank of San Francisco and signed by Hedgeside Distillery Corporation by R. I. Stone, president, and ask you if you recognize that to be the signature of R. I. Stone? A. I do, yes.

Q. And the seal of the Hedgeside Distillery Corporation? A. I do.

Q. Now, is that a document that was duly re-

(Testimony of Arthur E. Leithman.)

ceived at the note desk at the Anglo Bank and has been held at all times since that date at the bank and is still being held there?

A. That is right.

Mr. Fisk: I'd like to offer that in evidence.

The Referee: General pledge agreement dated the 16th day of October, 1942, signed Hedgeside Distillery Corporation by R. I. Stone, president, Respondent Bank's Exhibit No. 10. Mr. Fisk, do you desire to withdraw this document?

Mr. Fisk: Yes, all of these documents.

The Referee: Do you have a photostat of it?

Mr. Fisk: Yes.

Mr. Walsh: No. 10?

The Referee: No. 10.

(The document referred to was received by the Referee and marked "Respondent Bank's Exhibit No. 10.")

Mr. Fisk: I thought during the noon hour we would [1609] arrange the photostats.

The Referee: Is that all for Mr. Leithman at this time?

Mr. Fisk: Yes, excepting these (indicating).

The Referee: Very well, then, you want Mr. Leithman to remain until you decide?

Mr. Fisk: Yes.

* * * * * [1610]

Cross-Examination

By Mr. La Shelle: Q. Mr. Leithman, with reference to the note dated January 6, 1949 for \$18,130

(Testimony of Arthur E. Leithman.)

which I think is 19 and the warehouse receipt 3689-B which is dated the day before, January 5, 1949, and which you called the new security, you yourself didn't have anything to do with whether or not the note should be taken and the old note renewed or anything, did you, with the discretion of the [1964] bank in making the transaction?

A. No.

Q. In other words, your administration, if that is the proper word, was ministerial in character. You made certain entries, directed by other people.

A. That's correct.

Q. And am I correct in stating Mr. Bill White, one of the vice-presidents of the bank at that time, was in charge of the general Hedgeside loan account?

A. You're correct, yes.

Q. And the judgment exercised by the bank with reference to the taking of this security and other security and the loans on new notes or renewals of old notes, those judgments were exercised, I take it, by Mr. White.

A. That's right.

Mr. Fisk: I object to that on the ground that it is obviously not within the knowledge of this witness. The judgment that was exercised by Mr. White. I think he can state what Mr. White did, but that calls for his conclusion.

The Referee: Will you read Mr. La Shelle's question?

Mr. La Shelle: He said yes.

Mr. Fisk: I still ask that it go out.

The Referee: Sustained.

(Testimony of Arthur E. Leithman.)

(The last question and answer were read by the Reporter.)

The Referee: It may go out.

Q. In other words, Mr. White was in charge of that account.

A. He was in charge of that; that was his account. [1965]

Q. That was his account and all of the transactions that you have done with all of these various exhibits that have been introduced while you were on the stand, your actions with reference to those were ministerial in character. A. That is right.

Q. And you yourself did not exercise any judgment. A. At no time.

Q. With reference to the transactions themselves. A. At no time.

Q. That's correct. Now, with reference to—I just want to make sure that I just understand something about these ledger sheets (I happen to be using No. 27 here) and these ledger sheets are interest and principal liability ledger sheets are all the same, aren't they? A. Yes.

Q. On the same printed form, I mean?

A. Yes.

Q. And most of the columns here are self-explanatory to me, but to make sure that I understand them, I want to ask you this: You will notice toward the right-hand side of the sheet there is a column which is captioned "pickup," then to the right "direct" and to the right of that is "indirect." There are no entries in the indirect column,

(Testimony of Arthur E. Leithman.)

but there are a number of entries in the pickup and direct. A. Yes.

Q. Now, am I correct in stating that the pickup and direct are similar to what you get in a bank statement, the pickup being the old balance and the direct the new balance?

A. That is right, yes. [1966]

Mr. Fisk: Wait a minute; I didn't hear the answer. Speak up.

A. The pickup is the old balance and the new balance is added to the pickup.

Q. In other words, the pickup column is the old balance like you would have on a bank statement at the end of the month and the direct would be your new balance.

A. (Witness nods affirmatively.)

Q. Which would be——

The Referee: When you shake your head the Reporter doesn't get that. Is the answer yes?

The Witness: Yes.

Q. Now, I don't know whether it plays any part in this or not, but what would indirect be?

A. Doesn't play any part in this transaction. It would be something that probably the Hedgeside had discounted other papers—trade acceptances, something that is indirect. It has nothing to do with this.

Q. Now, with reference to warehouse receipt——

Mr. Fisk: Is this the Hedgeside you are pulling out now?

Mr. La Shelle: This is the group that was orig-

(Testimony of Arthur E. Leithman.)

inally given to be by Mr. Casey. It has now been split up into a lot of different numbers this morning. It never did have a number to start with.

(Discussion off the record.) [1967]

Q. I have here the ink memo, so-called which relates to warehouse receipt 3689-B, it consists of two pages, and I have forgotten, did you make this out? A. No, I did not.

Q. You didn't. Do you know who did?

A. Mr. Armstrong.

Q. Mr. Armstrong? A. Yes.

Q. Now, I want to make sure here that I understand these. On the upper left-hand corner of these ink memos, you start with the latest or the last note, don't you?

A. Yes, because we're working back.

Q. Then you work down the first column through on notes. A. (Witness nods affirmatively.)

Q. And you do the same thing in the second column, do you not? A. Yes, sir.

Q. And that would also hold true of page 2.

A. (Witness nods affirmatively.)

Q. So that the first note in question is at the end of these ink memos and the last note in question is at the beginning of them? (Indicating).

A. That's right.

Q. That's right? And that is the technique that has been followed on all of these——

A. On all of those.

Q. On all of these memos. Now, directing your attention to the Bank's Exhibit No. 4, which con-

(Testimony of Arthur E. Leithman.)

sists of a group of documents being warehouse receipt No. 3469-B, plus a note, plus an ink memorandum——

Mr. Fisk: May I interrupt you? What did you say [1968] the number of the warehouse receipt was?

Mr. La Shelle: The number I have is 3469. That's what Mr. Casey gave me.

(Discussion off the record.)

Mr. La Shelle: I know, but I'm directing his attention to this particular exhibit.

Mr. Walsh: Mr. La Shelle, in order to avoid any confusion, they made a mistake and gave you the wrong warehouse receipt. This is 3969.

Mr. Fisk: The warehouse receipt is 3689-B.

Mr. La Shelle: No, no, no, no; 3689-B.

Mr. Walsh: Is Respondent's Exhibit No. 20.

Mr. La Shelle: That's right. Now, I am directing his attention to an entirely different exhibit.

Mr. Walsh: Oh, Exhibit No. 4.

Mr. La Shelle: This is Exhibit No. 4.

Mr. Fisk: Oh, I beg your pardon.

Mr. La Shelle: This is Exhibit No. 4, which is a group consisting of a note, an ink memorandum and warehouse receipt No. 3469. Now, does that tie in with Mr. Casey?

Mr. Fisk: That's right, not introduced today.

Mr. La Shelle: No.

Q. Now, directing your attention to the ink memorandum on this particular note, that follows the same course as you have testified, if you look

(Testimony of Arthur E. Leithman.)

at the ink memorandum on the upper, left-hand [1969] corner, that's the last note and on the right-hand column, the lower part is the first note. That follows the same course, does it not? That consists of one sheet.

A. That's the same as the other one.

Q. Yes. Now, directing your attention to what would be the first note here, note No. 14357 for \$10,500, it states "came on our books 6-19-47" and written in "was secured by warehouse receipt 3469-B and No. 37." A. Yes.

Q. Now, directing your attention again to the ink memorandum which belongs to warehouse receipt 3689-B—I've lost track of that memorandum. What was it—20 or 21?

Mr. Walsh: Which one is that?

Mr. Fisk: Twenty.

Mr. La Shelle: Twenty?

Q. (Continuing): Warehouse receipt No. 20, directing your attention to the last two items on this ink memo, with a number of the note and the amount of the note, it states the same thing: "Came on our books 5-2-47." There is no notation there that it was secured by any warehouse receipt, is there? A. No, there is not.

Mr. La Shelle: That's all the questions I have, your Honor.

The Referee: Mr. Walsh?

Mr. Walsh: No questions, your Honor.

The Referee: Mr. Fisk?

(Testimony of Arthur E. Leithman.)

Redirect-Examination

By Mr. Fisk: [1970] Q. Mr. Leithmann, in carrying out your duties in the note department, is Mr. White the only officer of the bank that gave you any instructions?

A. I would say yes, his instructions were final.

Q. Is he the only officer of the bank who gave you any instructions?

Mr. La Shelle: Just a moment, your Honor, we object to that as having been asked and answered. It's cross-examination——

The Referee: He hasn't answered it. He said Mr. White's word was final, but that's not the question. Read the question.

Mr. La Shelle: My objection also to it is that doubtless he takes instructions from other officers, but with reference to the Hedgeside controversy——

The Referee: Objection overruled. Will you read Mr. Fisk's question?

(The last question was read by the Reporter.)

Mr. Fisk: Did you get the question?

A. Yes, he was the only one.

Q. He was the only one. That's all.

The Referee: Mr. Leithman, you are excused.

* * * * * [1971]

DAVID F. LOGAN

called as a witness on behalf of Respondent Bank, being first duly sworn by the Referee, testified as follows:

By the Referee: Q. Your full name?

(Testimony of David F. Logan.)

A. David F. Logan.

Q. L-o-g-a-n? A. Yes, sir.

Q. Where do you reside, Mr. Logan?

A. 181 Santa Rosa Avenue, Oakland.

The Referee: Very well, Mr. Fisk.

Direct Examination

By Mr. Fisk: Q. Mr. Logan, what is your business at the present time?

A. Manufacturer's representative.

Q. Were you ever connected with Hedgeside Distillery Corporation? A. I was. [2097]

Q. When were you last connected with that corporation? A. July 1, 1949.

Q. And in what connection were you associated with that corporation at that time?

A. Sales manager.

Q. Were you an officer of the corporation at that time? A. Yes, sir.

Q. What office? A. Vice-president.

Q. Were you a director? A. Yes, sir.

Q. When did you first become associated with that corporation? A. January 1, 1939.

Q. And in what capacity did you become associated with it at that time?

A. Sales manager.

Q. Were you an officer at that time?

A. No, sir.

Q. Do you recall approximately when you became an officer?

(Testimony of David F. Logan.)

A. Approximately eighteen months later if my memory serves me right.

Q. And at the same time, you became an officer, did you become a director? A. Yes, sir.

Q. Did you continue in those capacities for the Hedgeside corporation throughout the period from I would say the middle of 1940, as I understand your testimony, up until July 1, 1949?

A. I did, sir.

Q. Do you know Mr. Richard I. Stone?

A. I do.

Q. When did you first become acquainted with Mr. Stone? A. In the fall of '33.

Q. Now, did you become acquainted with him in a business [2098] way or in a social way?

A. Business.

Q. And do you recall generally the association at that time?

A. Yes, sir. He was liquor buyer for Glaser Bros.

Q. And in what business where you at that time?

A. I was a manufacturer's representative for two distilleries.

Q. Do you recall the names of those?

A. Yes, sir——

Mr. La Shelle: May it please the Court, we fail to see the materiality of this man's occupation or Mr. Stone's occupation in 1936 or thereabouts. It was years before this ever took place.

Mr. Fisk: I'm going into the qualifications.

(Testimony of David F. Logan.)

Mr. La Shelle: Before Hedgeside was even formed.

Mr. Fisk: I'm going into the qualifications of this witness.

The Referee: You may answer. Overruled.

Mr. Walsh: What was the answer—connected with what distilleries?

A. Kay Taylor Distilling Company of Frankfort, Kentucky and Krogman Distilling of Tell City, Indiana.

Q. What educational institutions did you go to, Mr. Logan?

A. Center College, Danville, Kentucky; Marion Institute, Marion, Alabama.

Q. Is that Marion Military Institute? [2099]

A. Yes, sir. U. S. Naval Academy and Annapolis Naval Academy.

Q. Do you recall approximately when you completed your education at the United States Naval Academy? A. In the fall of 1919.

Q. Did you continue in the military service after that or did you go into some private business?

A. I went with the Fiske Rubber Company of Chicopee Falls, Massachusetts.

Q. And how long were you with that corporation? A. Approximately ten years.

Q. In a general way, what was the work you did with the Fiske Rubber Company?

A. The beginning or the end?

Q. Just state in a brief, general way.

A. I started to work to learn the business, which

(Testimony of David F. Logan.)

was the tire business, and I left the business as assistant to the vice-president.

Q. When you left the Fiske Rubber Company, what, if any, institution did you become connected with?

A. I went with the Indiana Tire and Rubber Company of Akron, Ohio.

Q. And how long were you with that corporation?

A. One year.

Q. And after that what did you do?

A. I went to Europe as a manufacturer's representative. [2100]

Q. In any particular kind of business?

A. Rubber business, rubber machinery business and consultant thereto.

Q. How long did you remain in that work?

A. Three years.

Q. And that brings you up until approximately what date?

A. I returned to this country on the Europa on Labor Day, 1933.

Q. 1933? A. Yes, sir.

Q. Then what business were you in when you returned?

A. I engaged in the whiskey business at the advent of repeal, which as I recall, was the 7th of November, 1933.

Q. Where were you located in the liquor business after that period—what section of the country?

A. I did business in the State of California—Los Angeles, San Francisco.

(Testimony of David F. Logan.)

Q. Where did you make your headquarters?

A. In San Francisco.

Q. In that connection, did you do any business with Glaser Bros.?

A. Yes, I sold them a great deal of spirits.

Q. Now, were you ever connected with the Franciscan Farm & Livestock Company?

A. Yes, sir.

Q. When did you first become connected with that corporation?

A. At the date of their incorporation.

Q. And do you recall in what capacity you became connected [2101] with that corporation?

A. Well, I was a director and I was secretary of that corporation.

Q. And how long did you remain in those two positions with that corporation?

A. Until approximately June of 1949.

Q. Did you perform any services on behalf of Franciscan in a capacity other than as secretary?

A. Yes, sir.

Q. What services did you perform?

A. That of selling and advising regarding the functions of selling.

Q. You mean that you acted as a salesman selling the products of Franciscan Farm & Livestock Company.

A. Yes, sir.

Q. Were you acting in that capacity during the years 1946, '47 and '48?

A. Yes, sir.

Q. You stated that you acted in an advisory capacity regarding sales.

(Testimony of David F. Logan.)

A. And an actual capacity. Some things that did not concern me I was asked about; things that did concern me, I did them myself.

Q. Well, what services did you perform in an advisory capacity?

A. Well, it was not infrequent that you would be asked your opinion and to gather certain facts pertaining, as an illustration, to the charge that should be made on bottling of wine. [2102]

Q. During that period, what were the products sold and distributed by Franciscan?

A. Produced and sold, potato spirits, neutral grain spirits, whiskey, the by-products of its plant called distiller's spent, mash for cattle feed, the bottling of wine products, the distilling of grape brandy, and/or lees brandy.

Q. During the period '46 and '47, did Franciscan maintain any salesman for its products other than yourself? A. No, sir.

Q. Who was your superior—

A. Mr. R. I. Stone.

Q. In connection with the work performed for Franciscan.

A. Mr. R. I. Stone was president of Franciscan—

Mr. La Shelle: Just a moment, your Honor, we object to the form of that question and move to strike out the answer as to who his superior was. That calls for his conclusion and opinion. The books show who the officers were—the president, vice-president, and so forth.

(Testimony of David F. Logan.)

The Referee: Overruled.

Q. At the same time that you were carrying on the work you have just testified to for Franciscan, were you carrying on your duties for Hedgeside?

A. Yes, sir.

Q. And to whom did you report in connection with the work you performed for Hedgeside?

A. Mr. Richard Stone.

Q. Did you report to anyone else than Mr. Richard I. Stone in connection with the work you performed for either of said corporations?

A. No, sir.

* * * * * [2103]

Q. Did Hedgeside do a bottling work in connection with the operation of that distillery?

A. Yes, they did.

Q. Did Franciscan in connection with this distillery? A. They did.

Q. Did Hedgeside have a bonded warehouse?

A. They did.

Q. Did Franciscan have a bonded warehouse?

A. They did.

Q. Did Franciscan have a bonded warehouse throughout the entire period of its production?

A. No, they did not.

Q. Did Franciscan use the Hedgeside bonded warehouse? A. They did. [2145]

Q. Did Hedgeside use the Franciscan bonded warehouse? A. They did not.

Q. All of these questions I have in mind are the period of '46 through '48.

(Testimony of David F. Logan.)

The Referee: Do you understand that, Mr. Logan?

The Witness: No, I do not, sir.

The Referee: Mr. Fisk said all the questions he has in mind are from the period 1946 to 1948.

Mr. La Shelle: I think the questions themselves should show that because you never know when you're departing from that, your Honor. I object to that procedure; it's confusing to the witness, too.

The Referee: Very well.

Mr. Fisk: Is it all right if I state when I depart from that? Is that satisfactory? Well, all right.

Q. During the period from '46 to '48, inclusive, who determined for Hedgeside what purchases of distillery materials that were made?

A. Mr. Stone.

Q. Who determined from whom the material would be purchased?

A. Mr. Stone.

Q. What was the situation with respect to Franciscan in that respect?

A. Identical.

Q. In both instances, is that right?

A. Yes, sir.

Q. Who handled the accounting problems for Hedgeside during that period?

A. Mr. McMains.

Q. Were any outside accountants or CAP's employed? [2146]

A. Yes.

Q. Who were they?

A. Adolph Meyer & Company.

Q. Did they also handle accounting problems for Franciscan?

A. They did.

(Testimony of David F. Logan.)

Q. Who acted as Mr. Stone's personal attorney?

A. Mr. Phillip S. Ehrlich.

Mr. La Shelle: Just a moment, we object to who acted as Mr. Stone's personal attorney. I don't see what part that plays in here.

Mr. Fisk: I think it does.

The Referee: Mr. Fisk, you heard Mr. La Shelle's comment. What is your statement?

Mr. Fisk: Well, I want to show that Stone's personal attorney acted for Stone, Hedgeside and Franciscan during that period.

The Referee: You may answer. Overruled. Mr. Ehrlich—Mr. Philip Ehrlich.

A. Mr. Philip S. Ehrlich acted as attorney for Mr. Richard Stone—

The Referee: That's the question.

The Witness: Yes, sir.

Q. During that period, who acted as attorney for Hedgeside?

Mr. La Shelle: Same objection.

The Referee: Overruled.

A. Mr. Philip S. Ehrlich. [2147]

Q. Who acted as the insurance brokers for Hedgeside during that period?

Mr. La Shelle: We make the same objection, your Honor.

The Referee: Overruled. Who acted as insurance brokers? A. Erlanger, Reed & Meyer.

Q. And for Franciscan?

Mr. La Shelle: Same objection, your Honor.

The Referee: Same ruling.

(Testimony of David F. Logan.)

A. Erlanger, Reed & Meyer.

Q. Who determined for Hedgeside during that period when production would be commenced and when it would be discontinued? A. Mr. Stone.

Q. And for Franciscan? A. Mr. Stone.

Q. During that period, who negotiated the contracts for Hedgeside?

Mr. La Shelle: We make the same objection. That calls for the conclusion and opinion of the witness.

The Referee: Overruled. Who did?

A. Mr. Stone.

Q. And for Franciscan? A. Mr. Stone.

Q. Now, according to your recollection, from time to time was Franciscan overdrawn in its commercial bank account at the American Trust Company?

Mr. La Shelle: We object to that, your Honor, upon [2148] the grounds that the records are the best evidence.

The Referee: Sustained.

Q. From time to time during that period, who determined where the production of Hedgeside was to be warehoused? A. Mr. Stone.

Q. And in the case of Franciscan.

A. Likewise.

Q. Did you know of any instance during the production life of Franciscan where Hedgeside purchased whiskey from Franciscan?

A. I do not, sir.

The Referee: Read that question and answer?

(Testimony of David F. Logan.)

(The last question and answer were read by the Reporter.)

Q. Do you know what it cost Franciscan to produce the 2859 barrels of whiskey sold Barnhill in '46 and '47?

Mr. La Shelle: We object to that, your Honor, upon the grounds it calls for the records of Franciscan are the best evidence.

The Referee: Overruled. Do you know the cost?

A. Approximately.

Q. What did it cost approximately?

Mr. La Shelle: We make the same objection, your Honor.

The Referee: Overruled.

A. Around 65 to 67½ cents.

The Referee: A what?

The Witness: An OPG naked. [2149]

Mr. La Shelle: I guess the cook made a profit.

Mr. Fisk: What's that?

Mr. La Shelle: I said it looks like all hands and the cook made a profit—everybody.

Q. Mr. Logan, I show you Petitioner's Exhibit 1 in evidence which is negotiable warehouse receipt book of Hedgeside. I point to warehouse receipt 351, which is the first warehouse receipt appearing in that book, and in particular, to the statement "lot number, blank, storage 10 cents per bbl per month from July 28," and so forth "handling 25 cents per barrel."

Mr. La Shelle: What receipt number are you referring to—351?

(Testimony of David F. Logan.)

Q. Do you know what that (indicating)——

Mr. La Shelle: Is that printed or typed?

Mr. Fisk: The word storage is printed, but “blank” is—in the blank opposite storage, is inserted the figures “10 cents”; in the blank opposite the printed word handling is inserted the figures “25 cents.”

Q. Do you know what that figure 10 cents storage per month represents?

Mr. La Shelle: Just a moment, your Honor, we will object to that question. Counsel is looking at a cancelled warehouse receipt No. 351 issued to J. J. Dunbar & Co., Seattle, Washington. It is incompetent in this case; it has nothing to do with it. You might find it may be the same on the other warehouse receipts, but it [2150] could be entirely different deal.

Mr. Fisk: Well, I just picked the first one in the book, your Honor. I’ll go through all of the, if you want.

The Referee: Overruled. Ask him what that means. Overruled.

Q. Did you get the question?

A. What does it mean?

Q. Yes, what does it indicate?

A. Ten cents per barrel.

Mr. La Shelle: Just a moment, your Honor, the best thing is what it speaks for itself. Here is the written document and he is to give his conclusion as to what it means and to alter or vary or contradict the terms of a written document.

(Testimony of David F. Logan.)

The Referee: Not necessarily. I think he is going to explain what it means. Can you explain, Mr. La Shelle?

Mr. La Shelle: Well, it says——

The Referee: I am asking you whether or not you can explain what that means.

Mr. La Shelle: I don't have to; it tells me.

The Referee: Well, then the Court wants to know what it means.

A. In the language of the trade——

The Referee: Overruled. You may answer.

A. (Continuing): Which is the heritage of the whiskey [2151] business which is over a hundred years of age, the storage is gauged on barrels of fifty gallons or less at 10 cents per barrel per month, the warehouseman to exercise due care and diligence in taking care of the property of others. It is a rental of space, a rack space is what the 10 cents means.

Mr. La Shelle: May I ask the Court? Have you seen this? Is there any doubt in your mind that the storage is 10 cents per barrel per month?

The Referee: There is after hearing Mr. Logan's answer. I think Mr. Logan has certainly clarified the reason for it.

Mr. La Shelle: The reason for it. You know how to pay storage, don't you?

The Referee: For what?

Mr. La Shelle: For what you have stored.

The Witness: You see, certain services for your 10 cents.

(Testimony of David F. Logan.)

Q. Was that charge in effect during the years '46 through '48 in connection with any barrels of whiskey or spirits grain stored at Internal Revenue Bonded Warehouse No. 2?

A. Yes, sir, it was continuously.

Q. Who fixed that monthly charge on behalf of Hedgeside? A. Mr. Stone.

Q. Do you know when it was fixed?

A. It was fixed in January of '39.

Q. Now, was a similar charge in effect in connection with [2152] the issuance of non-negotiable warehouse receipts—

Mr. La Shelle: We make the same objection—

Q. (Continuing): during that period?

Mr. La Shelle: Just a moment. (Continuing) as incompetent, irrelevant and immaterial. You might make a deal with one person and charge him storage where another person you don't.

The Referee: Overruled.

A. It makes no difference whether it's negotiable or non-negotiable, the rate is the same.

Q. And it was during that period at Hedgeside, is that right? A. Yes, sir.

Q. Now, looking at the same warehouse receipt, 351, will you explain what the charge "handling 25 cents per barrel" is?

Mr. La Shelle: We make the same objection, your Honor, it's incompetent, irrelevant and immaterial and the document speaks for itself.

The Referee: Overruled.

Mr. La Shelle: I would like the record to show

(Testimony of David F. Logan.)

that the Court has overruled that objection without even looking at it, doesn't know what it is.

The Referee: The record so shows. You may answer, Mr. Logan.

A. Twenty-five cents handling charge means, in the language of the trade, taking it out of a box car, taking off of a truck or other conveyance that brought it there, taking it into the [2153] warehouse, checking the serial numbers of the government form, doing everything that you can do to inspect that barrel and nesting it into its location. That is the 25 cents in. The 25 cents out is identically the same thing, only reversed. It puts it on a carrier so that it may be taken away.

By the Referee: Are all those explanations in that 25 cents? A. No, sir.

Q. They are not. Would the Court have known all that?

A. No, sir, it is a trade practice that is done taken to mean that.

By Mr. Fisk: Q. And who fixed that charge in this case at Hedgeside? A. Mr. Stone.

Q. And approximately when?

A. January, 1939.

Q. Now, from that time up until the bankruptcy of the corporation, was there ever any change in either of those two charges? A. No, sir.

Q. Were similar charges made in connection with the warehousing at the Franciscan Internal Revenue Bonded Warehouse? A. Yes, sir.

Q. And by similar, I mean 10 cents per month

(Testimony of David F. Logan.)

in the case of storage and 25 cents per barrel in and out for handling.

A. Yes, sir.

Q. And in each of those instances, who fixed the charges?

A. Mr. Stone.

Q. During this period from '46 to '48, inclusive, did the [2154] Hedgeside Distillery Corporation advertise or solicit customers for storing of spirits or whiskey in its Internal Revenue Bonded Warehouse?

Mr. La Shelle: We object to that, your Honor, upon the grounds it calls for the conclusion and opinion of the witness and if there was any advertisement or solicitation, that is the best evidence.

The Referee: Overruled.

A. No, sir, it solicited no warehouse business.

Q. Did Hedgeside during that period warehouse—

Mr. La Shelle: May I have the page number of that please?

The Reporter: 156.

Q. Did Hedgeside during that period warehouse any of its own production in Internal Revenue Bonded Warehouse No. 2?

A. Yes.

Q. Did it warehouse all of its own production?

A. Yes, sir.

Q. Were there any instances where it warehoused its production in other warehouses?

A. Yes, sir.

Q. What other warehouses?

A. H & A Warehouse in Stockton.

Q. Were there any instances where Franciscan's production was warehoused in Internal Rev-

(Testimony of David F. Logan.)

enue Bonded Warehouse No. 2 during that period?

A. Yes, sir.

Q. Were there any instances where Hedgeside's production [2155] was warehoused in Franciscan's Internal Revenue Bonded Warehouse?

Mr. La Shelle: Your Honor, these questions have all been asked and answered.

The Referee: Are you making an objection, Mr. La Shelle?

Mr. La Shelle: Yes.

The Referee: Overruled.

A. No, sir, Hedgeside did not warehouse.

Q. Will you describe to the Court the purpose and function of Internal Revenue Bonded Warehouse No. 2 in connection with the operations of Hedgeside?

Mr. La Shelle: We will object to that, your Honor, upon the ground that the answer to that question will invade the legal province. The function of that warehouse is beautifully and very detailed laid out by the ATU laws and provisions.

The Referee: And also by one of your witnesses, but not Mr. Fisk's witness as yet. Overruled.

Mr. Fisk: Will you answer the question?

The Witness: Would you repeat the question please?

(The last question was read by the Reporter.)

A. The purpose and function of warehouse No. 2, Internal Revenue Bonded, is that the manufacturer, which in this case was Hedgeside, may dis-

(Testimony of David F. Logan.)

till his spirits grain, whiskey or otherwise, in bond and have a warehouse acceptable to the government in which he may place that satisfactory to the government, without the [2156] payment of the \$9.00 per rate of tax.

Q. Did it serve any purpose in connection with the bottling operation carried on by Hedgeside?

A. Yes, sir.

Q. Will you describe that to the Court?

A. Having an internal bonded warehouse, it was possible for the distiller to take merchandise out of bond with the minimum lapse of time that money had been borrowed, quickly paying the tax on it, putting the stamp on the barrel head, taking it into the bottling house, dumping it in a tank, producing it in proof and bottling it for the purpose of making a profit in bottling.

Q. Were there any instances during this period where Hedgeside permitted storage of production other than Hedgeside or Franciscan where there was no bottling operation involved?

Mr. La Shelle: We object to that upon the grounds it is incompetent, irrelevant and immaterial and the records of Hedgeside bonded warehouse are the best evidence as to what was placed on storage there, your Honor.

The Referee: Mr. Fisk?

Mr. Fisk: I submit that here is a man who is an officer and director of both corporations during this entire period. He was functioning on behalf of both corporations and handling these types of transac-

(Testimony of David F. Logan.)

tions and if there were any such instances, he should know about them and at any rate, the fact that he does know of any, if that be his answer, would show that that was [2157] not a business operation carried on by Hedgeside or Franciscan.

The Referee: And if there were any instances, they would appear in the records, would they not?

Mr. Fisk: That's right, but you couldn't necessarily tie it in from the records without a great deal of—you would have to run through every instance where anything was stored at either of the two warehouses and then determine where the production came from and whether or not there was a bottling contract and I would say that it would make the examination most protracted to do that.

Mr. La Shelle: Your Honor, as a practical matter, that then results in this. Mr. Fisk asks that you wipe out the best evidence rule here because it's a burden for him to prove it so then he wants to shift the burden to me on cross-examination. The only way I can impeach this witness is to bring in and do all that in the records. The burden is on him; not on me. The rule says that the best evidence is the records to be brought in. He wants to make it easy for himself and then if I want to impeach the witness, I've got to go through all the records.

The Referee: Sustained.

Q. Did you ever, during this period, obtain storage in either of said warehouses where the produc-

(Testimony of David F. Logan.)

tion was neither that [2158] of Hedgeside nor Franciscan nor any bottling contract involved?

Mr. La Shelle: Well, we make the same objection that was heretofore made upon the grounds that this question is designed to do indirectly what he was trying to do directly in the last question.

The Referee: Overruled. He said: Did you.

A. Yes, sir.

Q. In how many instances?

Mr. La Shelle: We make the same objection.

The Referee: Overruled.

The Witness: Would you read the question back again?

(The last question was read by the Reporter.)

A. The answer to that would be no, no, I never did where there was no bottling involved.

Q. Well, do you know of any instance where there ever was any storage in either of those two warehouses during that period where it did not involve either the production of those two units or a bottling contract?

Mr. La Shelle: We make the same objection, your Honor, that the records are the best evidence as to what was stored and in what instances and under what conditions.

The Referee: Overruled. Do you know of any?

A. One.

Q. Do you recall the name of the owner? [2159]

A. Yes, sir.

Mr. La Shelle: We make the same objection.

The Referee: Overruled.

(Testimony of David F. Logan.)

Q. State it.

A. Austin Nichols in New York had two or three hundred drums of spirits. It was a personal favor looking to further things that were going to affect it in the trade circles. It was done as a favor. When he didn't come through with his end we forced the purchase out of bond and made him take it elsewhere.

Mr. La Shelle: We move to strike out the answer on the grounds it is not responsive to the question and constitutes the conclusion and opinion of the witness as to giving favors and forcing things out.

The Referee: The part with reference to storing with Austin Nichols will remain in and the balance stricken.

Q. In the case of Austin Nichols, how many packages were involved?

A. Three or four hundred.

Q. And how long did they remain?

A. Three or four months.

Mr. La Shelle: Just a moment, we object to that, your Honor, as to that again the best evidence as to how long they remained there are the records of the company.

The Referee: Sustained. [2160]

Q. During this period, were there in operation according to your knowledge, any commercial warehouses where packages of whiskey or distilled spirits could be warehoused? A. Yes, sir.

(Testimony of David F. Logan.)

Mr. La Shelle: Just a moment. Will you read that question; I didn't get it?

(The last question and answer were read by the Reporter.)

Mr. La Shelle: I take it by that you mean, Internal Revenue Bonded Warehouse. Is that what you mean?

Mr. Fisk: I'll let the witness interpret the question and explain it with his answer.

Mr. La Shelle: We will object to the question, your Honor, upon the grounds it is incompetent, irrelevant and immaterial as to what warehouses might be scattered throughout the state.

The Referee: Read the question again.

Mr. La Shelle: And I also don't understand the word "commercial."

(The last question and answer were read by the Reporter.)

The Referee: Strike the answer out.

Mr. Fisk: I'll change the word "commercial" to "public."

Mr. La Shelle: We object to the form of that [2161] question, your Honor, as to what a public warehouse means.

The Referee: Sustained.

Mr. La Shelle: It's governed by law. Describing the type of warehouse he has seen, the number of it, or who owns it or something, is going into the question of law here.

Q. During this period, do you know of any warehouses in San Francisco where you may store

(Testimony of David F. Logan.)

packages of goods such as whiskey and distilled spirits?

Mr. La Shelle: We object to that, your Honor, upon the grounds it is incompetent, irrelevant and immaterial whether there is one or fifty warehouses of that nature in San Francisco.

The Referee: Mr. Fisk, you are talking about any kind of a warehouse where you can store liquor?

Mr. Fisk: They can be stored, yes, sir.

The Referee: You are not concerned about storing bulk goods or bonded goods or cases of bottles or what—

Mr. Fisk: I thought I said packages, and the word "package" as I understood it, your Honor, in this proceeding refers to drums or barrels. That is the terminology that has been used throughout in this proceeding but I will revise it if there is any question.

The Referee: You revise it.

Q. During this period, '46 through '48, do you know of the [2162] existence of any warehouse where you could warehouse barrels of whiskey and/or drums of spirits?

Mr. La Shelle: We make the same objection, your Honor, that it is incompetent, irrelevant and immaterial as to whether there were other bonded warehouses in California, San Francisco or any place. It has no probative value in this case on any issue.

The Referee: What is the purpose, Mr. Fisk?

(Testimony of David F. Logan.)

Mr. Fisk: The purpose of it is simply to show that Hedgeside and Franciscan too, a portion of the time, as a convenience to their operation there, had a bonded warehouse but there were other bonded warehouses that they could have used which wouldn't have been as convenient, but they could have used others. There were a couple in San Francisco; there is one in Stockton and, in fact, Franciscan did use Hedgeside's when it had none.

The Referee: Sustained.

Q. Did Hedgeside file its charges, its rates of charge in storage and handling in connection with its warehouses, with the Public Utilities Commission at any time during this period?

Mr. La Shelle: We object to that, your Honor, upon the grounds that the best evidence would be the filing of the documents themselves in question.

The Referee: Sustained.

Mr. Fisk: Well, if they didn't file them, your [2163] Honor, I don't know how we're going to produce the document. Certainly a document can't be the best evidence rule because there was no filing.

The Referee: Well, they could have filed them but they probably didn't file them but this witness wouldn't be the final answer, would he—whether they did or didn't?

Mr. Fisk: But certainly the objection that it's a violation of the best evidence rule is certainly no ground. The best evidence rule is the best evi-

(Testimony of David F. Logan.)

dence is the document. If there was no document, it couldn't possibly be the best evidence rule.

The Referee: The Court doesn't think that the answer of this witness here would be the best evidence as to whether they did or did not.

Q. Mr. Logan, when the rate of 10 cents per month storage charges was fixed for Hedgeside, was there any estimate made of whether or not that would render a profit on the operation?

A. No, sir.

Q. During your entire regime with that corporation, was there ever any effort made to determine whether or not the operation were a profitable one?

A. No, sir.

Mr. La Shelle: We object to that, your Honor, upon the grounds it's incompetent, irrelevant and immaterial whether there is any cost accounting or profit on that particular operation or not. Many companies take a loss [2164] in one department to secure an overall profit.

The Referee: Overruled. You said there never was. A. No, sir.

Q. Do you know whether or not the charges fixed in the Hedgeside operation and the Franciscan operation are higher or lower than the charge of warehouses storing bulk whiskey and spirits in barrels and drums than the charges of warehouse operations not carried on in conjunction with a distillery or bottling operation?

Mr. La Shelle: We make the same objection,

(Testimony of David F. Logan.)

your Honor, that it is incompetent, irrelevant and immaterial.

The Referee: Sustained.

Mr. Fisk: Might I be heard on that?

The Referee: Yes.

Mr. Fisk: If the Court please, our position here is simply this. That this Internal Revenue Bonded Warehouse here in the case of Hedgeside and in the case of Franciscan, are not public warehouses operated for a profit. These others are. They are just a convenient operation carried on in conjunction with a distillery or a bottling operation. They are not necessary but they are convenient to do it. They are not an operation carried on for a profit and they are not essential and I want to show that the charges here have no relationship; they're just arbitrary charges picked out of thin [2165] air because of the custom of the trade, entirely without relation to profit arrangement. That is not the case of the public warehouse where it is operated as an independent operation and filed with the Public Utilities Commission.

Mr. La Shelle: May it please the Court, I think we are aware in this case, throughout the distillery business, you have got to have a bonded warehouse and within either forty-eight or seventy-two hours, I have forgotten which—I think it's the latter, seventy-two—you must get your spirits barrelled down wherever they happen to be, say out in a receiving tank, so that you must get into an IRBW within three days of whatever you manufacture.

(Testimony of David F. Logan.)

That's so the government doesn't take any chance of losing its tax. Now, any distillery that has an operation of that kind almost must have at least within pretty close reach, an IRBW. They store for the account of whomever they may manufacture the whiskey for. If it's their own production, they store it for themselves. Now, whatever charges they want to make and do make and this witness has already stated that those charges are in keeping with the custom of the industry, whether or not they're lower or higher than some fellow that operates a bonded warehouse but has no distillery in connection with it is entirely immaterial. For example, in the South End [2166] Warehouse in San Francisco, if I'm not mistaken, (I'm not positive of my facts here) but I think that practically one hundred percent of their business is handling goods shipped in bond. In other words, the wholesaler has a couple of hundred barrels of Burnheim whiskey and he brings out a certain amount at a time and in order to keep his cost down, he ships from Kentucky out to San Francisco and has them bottled out here and that's what that warehouse does. They have a tax-paid bottling room and a bottling bond room and a storehouse and it's used essentially for shipping in bond. Now, they're operated in a slightly different operation and whether they're higher or lower here, I say, is not competent in this case. There is no probative value on any issue whatsoever.

(Testimony of David F. Logan.)

Mr. Fisk: In response to that, I say I think it has everything to do with it. Here is an operation that is carried on as a part of a distillery or a bottling operation without any idea whether it is a profitable transaction for the simple reason that the distiller is not in the business of the warehousing for a profit; he is in the business of a distiller for a profit, the business of a bottling operation for a profit. The other matter is simply a convenience. It is not necessary under the law to have a bonded warehouse. Franciscan has operated without a bonded warehouse. [2167] It simply is a convenience and it is a convenience that they carried on at an arbitrary figure of 10 cents entirely without regard to a profit. Now, your Honor well knows a public warehouse, whether it be internal revenue bonded warehouse or whether it be operated as a warehouse for a profit, is under the control of the Public Utilities Commission. **He must file his rates** and he cannot earn in excess of a fair profit and it also goes, as the Court well knows, that all utilities charge as high a rate as they are permitted to do under the regulatory body so that it is definitely pertinent here where those public warehousemen were definitely within the law in the business of acting as a public warehouseman for a profit and accordingly file with the Public Utilities Commission the rates they charge.

Mr. La Shelle: Your Honor, I think that what comes under a public warehouse and a private ware-

(Testimony of David F. Logan.)

house is very well defined by law in this state. There are quite a few laws on it and there are many cases interpreting them. I have read them and without citing them to you, I assure you there are a great many cases. Now, if Mr. Fisk wants to prove that this is or is not a public warehouse, why if he thinks he's got a legal point there he can go right ahead, but let him go ahead according to the rules of evidence and what is competent and [2168] what isn't. Let him show what their operation was up there at Hedgeside. Let him show what they did, which he has more or less, and then he comes in and says: "Now, the law says that an operation like this should have such and such a license," but to go into the question as to whether or not they charge more or less than some other warehouse in a different classification has nothing whatsoever to do with this case, remotely or directly or indirectly.

Mr. Fisk: Your Honor, in response to counsel, I say that I am satisfied and he can produce the volume of cases that he has indicated that holds up his opinion. The law is very clear. It is in very general terms and it is absolutely essential to produce evidence along the lines of what we are doing to fall within the terms of that statute, which is very, very general.

Mr. Casey: There are three statutes involved, your Honor. One is Section 3440 which both respondents are pleading. Now, Mr. La Shelle has filed a memorandum saying that there is an excep-

(Testimony of David F. Logan.)

tion to that statute when the facts fall within Section 3440. To come within 3440.5, the person operating the warehouse has to be in the business of warehousing for profit as defined in the Uniform Warehouse Receipts Act and what we are trying to do now is show that this particular warehouse was not in the business of warehousing for profit as [2169] defined by that code.

Mr. La Shelle: Your Honor, I have had many statements, or heard many statements by opposing counsel as to what the law is, but they never cite a case in this courtroom. Let them come in with a case now to show that evidence of this character is competent. I'd like to see one. Common sense tells you it isn't competent.

Mr. Fisk: Read the statute.

The Referee: Mr. La Shelle, Mr. Casey is enlightening the Court at the moment. He comes up with an entirely different statement and that is namely the statute which I imagine is going to be Mr. Walsh's main defense, is that correct?

Mr. Walsh: Definitely.

The Referee: The Court will change its previous ruling and permit you to answer, Mr. Logan.

Mr. La Shelle: I would like to interpose this further objection, your Honor. If there are any other warehouses and rates on file as they claim they have public warehouses which they would be, then this evidence violates the best evidence rule.

(Testimony of David F. Logan.)

Let them come in, if they think it's competent, with evidence as to what they charge.

The Referee: Mr. La Shelle, the point before the Court now is that under 3440 with reference to warehouses, [2170] certain facts and certain conditions must be met. Now, certainly that is relevant and competent.

Mr. La Shelle: Yes, but this——

The Referee: This has nothing to do with cases. We are talking now about the law.

Mr. La Shelle: That's what I'm talking about. How does it prove whether their rates are higher or lower than anyone else's under 3440.5 or any other section?

The Referee: We will hear the question again.

(The last question was read by the Reporter.)

Mr. Fisk: The question is pretty complicated.

The Referee: Let the record show that Mr. Fisk's question has been withdrawn.

Q. Mr. Logan, do you know whether or not the charges made by the independent internal revenue bonded warehouses, that is, by independent, I mean those internal revenue bonded warehouses carrying on only a warehouse operation, are higher or lower than these charges made by Hedgeside and Franciscan during the period '46 to '48, inclusive?

The Referee: Mr. La Shelle, are you satisfied if your objections and the comments with reference to Mr. Fisk's previous question are applied to this one?

(Testimony of David F. Logan.)

Mr. La Shelle: No, I would like to make the objection again, your Honor, that it is incompetent, irrelevant and immaterial in this case, that there is no foundation laid for the testimony whether this witness [2171] is qualified to answer the question.

The Referee: Overruled. Do you know whether they're higher or lower?

A. Yes, sir, I do know.

Q. And what are they—higher or lower?

A. They are higher.

Q. How much higher?

Mr. La Shelle: We make the same objection as just heretofore made, your Honor.

The Referee: Overruled.

Q. How much higher?

A. They are from 10 to 20 cents a barrel higher per month and the storage charges—I mean, the withdrawal charges are from 10 to 20 cents a barrel higher. Instead of 25, it would be 35 or 45 cents higher.

The Referee: Where are they higher—in other independents or at——

The Witness: At all warehouses——

Mr. La Shelle: Just a moment, please, Mr. Witness. We make the same objection to the Court's question.

The Referee: Overruled.

A. At all warehouses engaged in the storing of goods where that is their occupation, such as Haslett in Fresno, Haslett in Stockton, H & A in

(Testimony of David F. Logan.)

Stockton, San Francisco Warehouse, South End Warehouse, Hollywood Storage and others on the coast, because that was a part of my business as a broker and as a manufacturer's [2172] agent, to know rates just as much as it was selling. The same rates, your Honor, applies to whiskey producing in the State of Kentucky, which is my home and I lived there for fourteen years; I made a living at it.

The Referee: We will have a recess.

(A brief recess was taken.)

By Mr. Fisk (Continuing): Q. Mr. Logan, in regard to the storage by Austin Nichols you testified to, was he ever requested to remove his goods from the warehouse? A. Yes, sir.

Mr. La Shelle: Well, just a moment, we move to strike out the answer pending an objection. We object to that.

The Referee: So ordered.

Mr. La Shelle: We object to that on the grounds it is incompetent, irrelevant and immaterial whatever contractual obligations or transactions were had between Austin Nichols and Hedgeside in this case.

The Referee: Overruled. He was asked to remove his goods.

The Witness: Yes, sir.

Q. For what reason?

Mr. La Shelle: We make the same objection, your Honor.

The Referee: Overruled.

(Testimony of David F. Logan.)

A. Because their profit on the others was not forthcoming. [2173]

By the Referee: Q. What do you mean by that?

A. I mean, you could not afford to carry just storage unless you got something in bottling on the other side.

By Mr. Fisk: Q. And had he promised the bottling contract? A. Yes, sir.

Mr. La Shelle: Just a moment, your Honor—

Q. And then refused—

Mr. La Shelle: —I want to interpose the same objection, your Honor.

The Referee: Are you finished, Mr. La Shelle?

Mr. La Shelle: Yes, the same objection.

The Referee: Overruled. Now, read Mr. Fisk's question.

(The last question was read by the Reporter.)

Q. He promised to enter into a bottling contract.

A. Yes, sir.

Q. And subsequently refused to do it.

A. Yes, sir.

Mr. La Shelle: We make the same objection.

The Referee: Same ruling.

Q. Mr. Logan, you testified that at times Hedge-side stored its production at the H & A Warehouse in Stockton. Did it ever do so immediately upon barreling down of the production?

Mr. La Shelle: We make the same objection, your Honor, that it is incompetent, irrelevant and immaterial [2174] in this case.

(Testimony of David F. Logan.)

The Referee: Mr. Fisk, what is the relevancy of this, whether or not they stored it at the H & A?

Mr. Fisk: I simply wanted to show that at times, and this is in response to Mr. La Shelle's contention, that under the law you couldn't produce on one day and barrel it down and store it on the same day, unless you had a warehouse on the premises.

Mr. La Shelle: No, I didn't say that. I said you have to get it in a bonded warehouse within seventy-two hours of its production in a bonded warehouse.

Mr. Fisk: I just wanted to show as a practical matter we did do that and stored over at H & A at Stockton and not at Hedgeside.

The Referee: Would it alter the——

Mr. Fisk: If I remember the record correctly, and I think I am correct in this, he stated that it was impossible for us to function without an internal revenue bonded warehouse on the premises because it had to be stored within seventy-two hours and as a practical matter we couldn't do that. That's what I got out of his statement.

Mr. La Shelle: I didn't say that. I said the law says you have to put it in bond within three days' production and for that reason, usually distilleries have one right there as a convenience. Now, for example, [2175] when the IRBW at Franciscan was not working and the one at Hedgeside was close enough, as a practical matter they could do it. Maybe they could do it as a practical matter in Stockton. Maybe, if there was one in Sacramento,

(Testimony of David F. Logan.)

they could do it. But I fail to see where it has any relevancy in this case.

Mr. Fisk: Well, the relevancy is if counsel is willing to admit that it is not essential or necessary to the operation of the distillery to have an internal revenue bonded warehouse, why I'll drop the testimony. I simply have taken the position and I am endeavoring to prove through this witness that the having of the internal revenue bonded warehouse on the premises was simply a convenience to the operation. As a practical matter it may be carried on with an internal revenue bonded warehouse elsewhere, in San Francisco, Stockton, Sacramento, Yountville, or what not.

The Referee: Mr. La Shelle, you admit that provided it is barrelled down within the statutory period, it was——

Mr. La Shelle: I am not admitting anything. My statement is this, your Honor, that the law provides it must be barrelled down within, I think it is seventy-two hours— Am I right on that, do you recall? I think it is seventy-two hours. I'm not sure, but it's some relatively short period of forty-eight to seventy-two [2176] hours, you must get it. Now, if a distillery does not have a warehouse, somehow or other it has got to get it in bond or it's in dutch with the Federal Government as a violation of the law. There is no question about that. This is a matter of law.

The Referee: I just asked you that, Mr. La Shelle, and you said you are not admitting any-

(Testimony of David F. Logan.)

thing, so if you are not, I'll have to permit Mr. Logan to answer the question. Your objection is overruled.

Mr. La Shelle: We are satisfied with our position on the objection.

The Referee: Very well.

The Witness: What is the question again, please?

(The last question was read by the Reporter.)

Mr. La Shelle: Now, just a moment, what do you mean by the barreling down of the production? I don't understand that. It has to be barrelled down in the warehouse, doesn't it?

The Referee: Let the record show, Mr. La Shell, you said you were satisfied with your objection. Now, evidently you are not, so the Court will permit you to change the objection.

Mr. La Shelle: We do object to the form of the question and because upon its re-reading, I don't know exactly what Mr. Fisk means by barreling down.

Mr. Walsh: Mr. La Shelle has used that term—

Mr. Fisk: Throughout the proceeding, and so have the witnesses.

The Referee: You may answer. Overruled.

The Witness: May I clarify it?

The Referee: I would rather, Mr. Logan, that you answered the question and then clarify it.

The Witness: All right, sir.

A. Yes, sir, it has been expedited immediately after barreling down.

(Testimony of David F. Logan.)

Q. Now, give your explanation.

A. Now, that "immediate" does not mean what it sounds like. You don't have to immediately. You have two tanks and a cistern that will hold twenty thousand gallons or ten or whatever you want to. So what Mr. Sichel means, according to the law, you can't hold the merchandise after it is barrelled down, more than seventy-two hours in the cistern room, but no one wants to, as a matter of transportation facilities. You take it out of the tank, put it into the barrel, put the indices on the end of the barrel; then you can transport it at four o'clock this afternoon, tomorrow or the next day, but you cannot keep it barrelled down longer than seventy-two hours in the cistern room, but nobody wants to. That's long enough to get it expedited out of there.

The Referee: Now, have you answered the question with reference to the warehousing at Stockton?

The Witness: Yes, sir. [2178]

Mr. Fisk: That's all.

Cross Examination

By Mr. La Shelle: Q. Mr. Logan, on occasion here a little while ago, we had occasion to have the court reporter read back one of your answers with reference to your signing the minutes, you know, of the Franciscan board, and one of your answers was that they would give you a paper as to what had transpired at the meeting and you would sign it.

(Testimony of David F. Logan.)

A. (Witness nods affirmatively.)

Q. Am I correct in my summary of your testimony on that?

A. (Witness nods affirmatively.)

Q. Now, I think you have already identified your signature on this here, Mr. Logan?

A. Yes, I have.

Q. That is D. F. Logan and the other signatures are R. I. Stone, Michale M. Falkoff and Marcus Glaser.

A. Yes, sir.

Q. And then immediately above that is a type-written statement which read as follows: "We the undersigned directors hereby consent to the holding of the foregoing meeting and have read and do hereby approve of the foregoing minutes thereof." Now, you stated that when you signed this paper pasted in on page 22, that you never saw the piece of paper for the balance of the minutes on page 21, is that correct?

A. That is correct, sir.

Q. So that when you signed this it is your testimony that you signed it not knowing what you were signing.

A. No, sir. [2179]

Q. How did you know what you were signing if you didn't see page 21?

A. I signed for this part up here (indicating). I signed for what's on 22.

Q. In other words, you felt that number 22 was the complete minutes of the meeting?

A. Yes, sir.

Q. And on page 22, do you find anything which

(Testimony of David F. Logan.)

shows as to the date of the meeting or where it was held? A. No, sir.

Q. And you knew, as your knowledge as a director, did you not, that director's minutes usually show the date that it was held and where it was held?

The Referee: What is your answer, Mr. Logan?

A. I perhaps overlooked it.

Q. When you signed this signature which is now on page 22, is it your testimony now to the Court that you felt that that was the entire minutes of that meeting? A. Yes, sir.

Q. Did anyone tell you that it was?

A. No, sir.

Q. You signed other minutes in this book the same way, did you?

A. I presume so, except two.

Q. I direct your attention here to page 23 and that is your signature there, isn't it again, D. F. Logan? A. Yes, sir.

Q. And the same typewritten provision "we, the undersigned directors, hereby consent to the holding of the foregoing meeting and have read and do hereby approve the foregoing minutes thereof." And directing your attention to the top of the page, it states in capital letters: "Minutes of Special Meeting of [2180] Board of Directors of Franciscan Farm & Livestock Co. held March 15, 1948." Had you ever served on a board of directors before this board? A. Before this particular—

(Testimony of David F. Logan.)

Q. This particular company? A. Yes.

Q. And had experience at board meetings and attended board meetings and signing minutes?

A. No, sir.

Q. You were on the board but never attended a meeting or signed the minutes? A. One.

The Referee: One what, Mr. Logan?

The Witness: One meeting.

Mr. Walsh: I wonder if he understands the question, your Honor.

The Referee: Mr. La Shelle, that's why I—— You mean, there was one other corporation that you belonged to?

The Witness: Yes, sir.

The Referee: At which you attended one meeting.

The Witness: Yes, sir.

Q. And did you sign the minutes of that meeting? A. Yes, sir.

Q. And when those minutes were presented for your signature, you saw the general form, did you not, of where they give the date and the place of the meeting at the beginning of the minutes?

A. I never paid any attention.

Q. Now, directing your attention again to page 22 and in reading the top part of 22, what on that page, either singly or [2181] taking the whole page together, led you to believe that they constituted the entire minutes of the board?

A. The importance of your war grain powers which I was very much interested in at that time.

(Testimony of David F. Logan.)

Q. And that led you to believe that it constituted the full minutes of the board. A. Yes, sir.

Q. Where was it that you signed these minutes?

A. My desk at Hedgeside.

Q. Was anyone present besides Stone?

A. Pardon?

Q. Was anyone present besides Stone?

A. Not to my knowledge.

Q. Now, Mr. Logan, on a couple of occasions here, (I have it twice in my notes) you stated that while there were occasions when Franciscan stored its production in Hedgeside's IRBW, that at no time did Hedgeside production go to the IRBW at Franciscan.

A. To the best of my knowledge, there were no occasions.

Q. And what do you base that on, Mr. Logan?

A. Observation.

Q. Do you think you could be mistaken?

A. Yes, sir, I could be mistaken.

Q. You haven't checked that. A. Pardon?

Q. You haven't checked the records to see——

A. No, sir, I have no access to them.

Q. Now, Mr. Logan, do you know of your own knowledge whether or not at any time while you were connected with Franciscan, [2182] Marcus Glaser was paid a salary by Franciscan in any capacity? A. I only know it by hearsay.

Q. Have you any knowledge with reference to his activities in any capacity? A. No, sir.

Q. Did you ever see him up there?

(Testimony of David F. Logan.)

A. Never.

Q. At either Hedgeside or Franciscan, I mean.

A. No, sir.

Q. Did you know anything about a dispute between Mr. Glaser and Mr. Stone over the selling of any whiskey from Franciscan to Hedgeside?

A. No, sir.

Q. Did you ever know of a dispute with reference to the price of whiskey sold by Franciscan to Barnhill after the sale was completed?

A. No.

Q. Well, I mean up to the time that you took the stand this afternoon.

A. No, sir——

Q. So that as far as you know——

The Referee: Pardon me, were you going to complete your answer?

A. (Continuing) I would like to qualify it by saying he asked me did I know that, of a dispute. I take the word dispute. I only know this and I will qualify it. That I did hear from Stone "I have given Glaser a \$14,000 credit rebate." So I did know that.

Q. But you didn't know of any dispute which led up to any——

A. I knew that he gave him a \$14,000 rebate, and it was so referred to. [2183]

Mr. Fisk: Well, now, if the Court please, could I have a couple of questions read back?

The Referee: Wait a minute, Mr. La Shelle. I was going to stop Mr. Fisk if he was going to ex-

(Testimony of David F. Logan.)

amine the witness but I will permit him to hear the questions read naturally.

Mr. Fisk: I would like to read back about three questions and answers.

(The last three questions and answers were read by the Reporter.)

Q. Now, when was it that Mr. Stone made some mention to you of, I think you called it a rebate. I think we can refer to it as a credit memorandum. When was that to the best of your recollection that Stone told you about it?

A. That was in the spring of '48.

The Referee: What?

The Witness: '48—1948.

Q. And would you say that that was sometime in March of '48?

A. Yes, sir, to the best of my knowledge.

The Referee: What was that?

The Witness: To the best of my knowledge.

Q. And with reference to the occasion of your call from Mr. Luckman from the White House, which is fixed rather firmly in your mind.

A. Yes, sir.

Q. When would you say it was with reference to that—before or after or about the same time?

A. About the same time. [2184]

Q. And it was about the same time that you signed those minutes, isn't that right?

A. No, I would say that the minutes followed that.

Q. Didn't you use that phone call as fixing the

(Testimony of David F. Logan.)

time of signing the minutes in your direct examination a little while ago? A. Yes, sir.

Q. And isn't it a fact, Mr. Logan, that at the time you signed those minutes, Mr. Stone told you that at the meeting of the board of directors, it had passed a resolution approving a credit memorandum? A. No, sir.

Q. Could you fix, either accurately or approximately, what time it was he told you about the credit memorandum and what time it was that you signed those minutes?

The Witness: What was the question?

(The last question was read by the Reporter.)

A. Yes, in late March.

Q. No, I mean how much— The question was clumsy, I'm sorry. Could you fix with any degree of accuracy at all the lapse of time between the two events? In other words, you said they weren't together. A. No, sir.

Q. It was sometime in the same month, however. A. Within that period.

Q. Now, I will direct your attention to one of Petitioner's Exhibits, for the benefit of counsel—I'll withdraw that question for the moment. As I recall it, you were fairly accurate or at least it seemed to me you were, in reference to [2185] disposing of the by-products of Franciscan, were you not? A. Yes, sir.

Q. And is there any difference between the by-products of what you would call whiskey and the

(Testimony of David F. Logan.)

by-products of what you would call high-proof spirits?

A. You mean, food value?

Q. Well, I mean, was there any difference? You can explain your answer.

A. Well, yes, sir, I'll answer by saying there is a difference.

Q. And would you explain to us what that difference is? A. In my own words?

The Referee: We are talking now about by-products.

Mr. La Shelle: The difference between by-products and whiskey.

The Referee: Explain the difference.

Q. I'll withdraw that question first, and ask you this preliminary so that we understand. Whiskey normally is distilled at around 107 or 110 proof, isn't it? A. (The witness nods negatively.)

Q. What is it? A. No, sir.

Q. What is it then?

A. Generally not less than 130 nor more than 159.

Q. And it's barrelled down at what, as a rule?

A. 101.

Q. All right, now, what I mean by high-proof spirits, I mean [2186] 190 proof or higher. That's the usual standard, isn't it?

A. That's correct.

Q. Neutral spirits are 190 or higher.

A. That's right.

Q. So I have in mind the difference between

(Testimony of David F. Logan.)

high-proof at 190 or higher and the whiskey proof. Explain the difference there.

A. In the by-products, whiskey generally has a different recipe in the grain content. It has more malt, it has some rye, it may have corn and milo. That is the recipe of the formula. The yeast is generally different in its composition, in its germ cell. Inversely, for neutral grain spirits, it being a cost thing, how cheap can you make it, is generally the cheapest starch grain which could be milo or it could be wheat or it could be corn, with the minimum amount of maltose, malt barley to convert it over to starch and then to sugar, so that the resultant, if you analyze the protein content, for a steer or for a cow, would unquestionably be slightly different. I'm not a chemist so I couldn't say how much different. It would have to be different.

Q. Well, from a commercial standpoint, I mean, would you expect to get more for the by-products of neutral spirits or more for the by-products of whiskey? A. The same.

Q. You get the same, although the recipe and proof and everything are different. Now, in connection with your activities at Franciscan, with reference to its production, did you [2187] do anything at all other than handling or negotiating or concerning yourself with its by-products?

A. No, sir.

Q. That's all you did. A. Yes, sir.

Q. And naturally, the amount of by-products

(Testimony of David F. Logan.)

you had to sell depended upon your production, isn't that right? A. Certainly.

Q. In other words, when you were producing, you had your by-products. A. Yes.

Mr. Fisk: Would you speak up? It's difficult for the reporter.

The Witness: I'm addressing my remarks to him.

Mr. Fisk: I know, but instead of nodding your head, please.

Q. Now, isn't it true, Mr. Logan, that during the summer and winter of '46, which you call your fall inspections—I'm correct in stating the first six months of the year are called spring inspections and the second six months are called fall inspections. A. That's right.

Q. So that the whiskey produced in the first six months is called spring inspection whiskey and the latter, fall inspection whiskey.

A. That is correct.

Q. Now, in the fall inspection months of '46, isn't it true that at that time Franciscan had a production contract with Schenley for some kind of merchandise? A. I know that by hearsay.

Q. Did you ever see the written contract between Franciscan [2188] and Schenley which covered that period of time in '46?

A. No, sir, I never did.

Q. Did Mr. Stone tell you about it?

A. Parts of it, yes, sir.

Q. Did you know from what you were told there

(Testimony of David F. Logan.)

as to whether or not that called for whiskey of high-proof spirits?

A. I don't remember, no, sir.

Q. Do you remember whether or not—I'll withdraw that. How many stills did Franciscan have, if they had more than one?

A. It had technically three.

Q. And during the fall inspection months of '46, was anyone of the Franciscan stills capable of manufacturing spirits of 190 proof or higher at that time, do you recall?

A. Two of them were, yes, sir.

Q. And had they produced to your recollection, any spirits that summer?

A. I wouldn't know that.

The Referee: What's that?

A. I wouldn't remember whether they produced spirits during that entire fall period or whether they produced spirits and whiskey, if that was his question.

(Discussion off the record.)

The Referee: Under the circumstances, gentlemen, we have no alternative except to continue the matter until Monday, October 23. Mr. Logan, you are instructed to return. Ten-thirty, Mr. Logan.

(Discussion off the record.) [2189]

The Referee: Let the record show that Respondent's Exhibit No. 1, being the minute book of Franciscan, is being returned to Mr. Fisk and Mr. Casey and that Mr. Walsh, who heretofore took back the negotiable warehouse receipt book, Petitioner's Ex-

hibit No. 1 and brought it to court today, Mr. Walsh is taking it back with him.

(Discussion off the record.)

Mr. Fisk: Mr. Jaffa and Mr. Dinkelspiel and I believe, Mr. Glaser, said that I could have access to all of the records of Franciscan that are here in the possession of the Court, that I could have it out of their presence and the Court too, as I understand. Now, I know the Court, or rather, I think the Court has a practice of being in San Jose on Friday.

The Referee: Not tomorrow.

Mr. Fisk: I was going to ask if the Court would advise some of his assistants here to let us have access to them if that's agreeable.

The Referee: The books are available and the Court will not be in San Jose tomorrow.

(Discussion off the record.)

The Referee: Mr. La Shelle is taking Petitioner's 75, 75(a), 76, and 74 to have the four exhibits photostated, and Bank's 31 is being turned over to Mr. Fisk and Mr. Casey for the purpose of being photostated. [2190]

Monday, October 23, 1950—10:30 a. m.

Same appearances.

The Referee: Hedgeside Distillery Corporation.

Mr. La Shelle: Your Honor, at this time, I am going to make a motion to strike the testimony of the witness, Mr. Logan—all of the testimony with reference to storage rates and handling charges

and the testimony with reference to the charges by other warehouses in San Francisco and other areas. With reference to the testimony of other warehouses in San Francisco area, I direct the Court's attention particularly that there is no foundation laid for that testimony and it is tantamount to testimony, for example, that a men's store in Napa is not operating for profit because it doesn't charge the prices that Bullock & Jones in San Francisco charge for similar goods. In other words, there is a great deal of difference between San Francisco and union rates, local conditions, cost of operation, so that there would have to be a foundation laid for that particular testimony. With reference to the testimony in general, this precise question has been brought up in cases under the Uniform Warehouse Receipts Act, which was adopted by California and there are two cases on that that I have here at my fingertips over the weekend. There are more. One is the [2191] case of *Webb & Co. vs. Friedberg*, 126 S. E. 508 and *Citizens State Bank of Vici vs. Gettig*, 187 Pac. 217. That precise point was raised in those cases and rejected. If your Honor will recall, Mr. Casey called the Court's attention to the fact that Section 3440.5 which exempts warehouse receipts from 3440 refers in substance to warehouseman as defined in the act and there is a warehouse receipt issued and copies and so forth and the definition of a warehouseman in the act is one who stores goods for another for profit and that precise question was raised in these two cases. And

we checked it in the Webb case, page 507 of his decision the Court states:

“If the concern is engaged in the business and goods are stored for profit, the statute implies that notwithstanding it if the company stores its own and also the goods of others, the receipt issued terms itself ‘warehouse receipt’ shows on the face that the goods were stored for profit. It gives the storage rates.”

In the Citizens’ case, it states (this is page 218):

“It might be contended that the evidence disclosed in this case that no charge was to be made for the storing of the goods. That is true, but the profit anticipated was the expectancy of buying the goods in the future and the profit expected to be derived therefrom.”

In other words, it doesn’t have to be a profit as such under the warehousing operation if the operation was such as to anticipate an overall profit. So on the ground, therefore, that it is incompetent, irrelevant and immaterial, and particularly, that there is no [2192] foundation laid, we move to strike out that testimony, your Honor.

Mr. Fisk: If the Court please, the only question of charges made by others is only cumulative evidence. It, along with all of the other things that are in the record, govern the question of determining charges, to determine whether or not the operator of the warehouse is in the warehouse business for a profit. It only goes to the weight of the evidence. Regardless of what these cases hold (neither

of them, I take it, are California cases), but regardless of what they hold, they definitely do not hold that you cannot go into the question of charges in order to determine whether or not a warehouseman is operating a warehouse for a profit as determined from a statute or the Uniform Warehouse Receipts Act as applied in California under Section 3440. It only goes to the weight.

The Referee: Submitted?

Mr. La Shelle: Submitted, your Honor.

The Referee: Is that submitted? I'll have to look at the cases, Mr. La Shelle.

Mr. La Shelle: Ready to proceed?

The Referee: Yes.

Mr. Fisk: In that connection, may we submit what cases we have?

The Referee: Yes, send me a brief memorandum, such [2193] as a letter, and Mr. La Shelle.

Mr. La Shelle: Mr. Logan, I'll try to be brief.

DAVID F. LOGAN

having been previously sworn, resumed the stand and testified further as follows:

Cross Examination—(Continued)

By Mr. La Shelle: Q. The negotiable warehouse receipts which were issued to Barnhill and which you signed and in which, I think you stated that when you signed them, you assumed that non-negotiables had been turned in. That's right, isn't it?

A. Yes.

(Testimony of David F. Logan.)

Q. Those receipts are all dated January 3, 1948. Now, during the period of '46, 7 and 8 you were aware, were you not, or familiar with the general production of both Franciscan and Hedgeside, I mean, what they were producing?

A. In a very broad way.

Q. In other words, you knew that this particular whiskey of Barnhill on the receipts that you signed, was Mountain View or Franciscan whiskey.

A. Yes.

Q. You knew that. A. Yes.

Q. And you were familiar with the fact, were you not, that there was a contract for spirits, neutral spirits, between Schenley on the one hand and Franciscan and Hedgeside—two different contracts?

A. By hearsay—

Mr. Walsh: Just a moment, I am going to object to that question. [2194]

The Referee: Will you first read the question, before Mr. Walsh makes his objection?

(The last question was read by the Reporter.)

Mr. Walsh: I am going to make the objection, if your Honor please, on behalf of the trustee, that if there are any contracts in existence, they speak for themselves. The fact that he knew they were in existence has nothing to do with the issues of this case.

Mr. Fisk: Well, my objection would be that if he is going to interrogate the witness about the contracts, he should show him the contracts.

The Referee: You can answer, Mr. Logan,

(Testimony of David F. Logan.)

whether or not you knew the contracts mentioned were in existence. Just yes or no.

A. By hearsay only.

Q. In other words, Mr. Stone had told you that there were production contracts with Schenley.

Mr. Walsh: Just a minute, if your Honor please, that is not the evidence.

The Referee: You said by hearsay only.

The Witness: Yes.

The Referee: Well, let the record show that the Court has overruled Mr. Walsh's objection, other than permitting Mr. Logan to answer yes or no. And now the next question Mr. La Shelle asked you and you said "by hearsay only." [2195]

The Witness: Yes, sir.

Mr. La Shelle: This goes to the question of the witness' knowledge. I'm not trying to put in contracts.

The Referee: Now, the next question, Mr. La Shelle.

Mr. La Shelle: I'll reframe the question, your Honor.

Q. Am I correct in stating that Mr. Stone told you of the contracts?

A. I don't know whether Stone or someone else. I have heard of it.

Q. I see. In other words, you knew that you were producing spirits and—

A. I knew there was a contract, Mr. La Shelle. The contents, I do not know.

Q. No, I am not talking about the contracts

(Testimony of David F. Logan.)

standing alone. What I mean is this: You knew that spirits were being produced at Hedgeside and sold to Schenley. A. Yes, sir.

Mr. Walsh: At Hedgeside, Mr. La Shelle?

Mr. La Shelle: Yes.

Q. And you also knew that spirits were being produced at Franciscan and sold to Schenley.

A. Yes, sir.

Q. Now, with reference to Bank's Exhibit No. 6—

(Discussion off the record.)

Q. Directing your attention to warehouse receipt No. 3472-B of Hedgeside, which is part of Bank's Exhibit No. 6 and which covers a hundred barrels of whiskey, there appears to be your [2196] signature here as the counter-signature of D. F. Logan, and that is your signature. A. That is correct.

Q. Now, this was issued on or about July 30, 1947; that's the date of the receipt. With reference to the signing of that receipt, did Mr. Stone ask you to sign that to the best of your recollection?

A. It was a general practice that he would ask me to sign it.

Q. Have you any recollection on the subject at all as to the circumstances surrounding your signing that warehouse receipt?

A. This particular one?

Q. Yes. A. No, sir.

Q. And there is nothing about that that refreshes your recollection at all. A. No.

Q. And Mr. Stone's general practice on the vari-

(Testimony of David F. Logan.)

ous receipts that you signed was to bring the receipt to you and he would sign it and he asked you to sign it and you relied on him, is that about right?

A. That's right.

Q. In other words, you didn't question——

A. I would have no way to question.

Q. (Continuing) the authenticity of them at all. And I take it that I am also correct in stating that at the time you executed some of these receipts that you yourself had no idea that there might be duplicate receipts outstanding.

A. None whatever.

Q. Now, with reference to some of your testimony last [2197] Thursday, as I understood you to say, that at the time that the storage charges were fixed at 10 cents a barrel per month, 25 cents handling per month, that to your knowledge, no estimate or determination was made from a cost accounting basis as to whether or not strictly the warehouse operation would yield a profit at that rate.

The Witness: What was the question please?

(The last question was read by the Reporter.)

A. That is correct.

Q. And I think that you, in answer to some of Mr. Fisk's questions Thursday, with reference to what Mr. Stone did, you stated—correct me if I'm wrong—that he did everything that you would normally expect a president or general manager to do as to both corporations.

A. Are you asking me that question?

(Testimony of David F. Logan.)

Q. Yes.

A. My answer to that question was he occupied the position of general manager and a complete monarch or boss, to do as he wished, to hire, to fire, to borrow, to do everything that he wishes of the two Siamese twins—Hedgeside and Mountain View.

Mr. La Shelle: We move to strike out his testimony of the Siamese twins.

The Referee: So ordered.

Mr. Walsh: If your Honor please, I think that is very material. He asked the question. I think it is stated just exactly what Stone did. [2198]

The Referee: Yes, but Mr. La Shelle's question, Mr. Walsh, was, I understood, in answer to Mr. Fisk's question at the last hearing you testified that Mr. Stone performed all the duties with reference to the duties of a general manager and president and Mr. Logan is correcting that statement.

Mr. Walsh: I'll take it on my motion.

The Referee: You did get the Court's order with reference to striking out that part of the witness's testimony.

Mr. Walsh: Just that portion.

The Referee: That's correct. You still have not answered Mr. La Shelle's question. Read Mr. La Shelle's question first again and then with reference to the president and general manager and then read Mr. Logan's answer up until that part that is stricken.

(Testimony of David F. Logan.)

(The Reporter read from the beginning of line 10 on page 2198 to the end of the word "wishes" on line 20, page 2198.)

Mr. La Shelle: I think, your Honor, that the witness' testimony as to being a monarch to do as he wishes, should go out on the same basis as the Siamese twins—as the witness' conclusion.

Mr. Fisk: If the Court please, may I say something here? Mr. La Shelle's question obviously calls for some explanation by this witness of what he meant by that statement if he made it. If he is just asking him if he made the statement or whatever his statement was without any interrogation as to what he had in mind, then I say that the record speaks for itself. And I say that as I understand this witness' statement, he has explained to counsel whatever his testimony was or may have been in the record—what the situation was. Certainly, I think it is responsive to that extent.

The Referee: Well, the Court distinctly recalls the question that Mr. La Shelle is referring to with reference to Mr. Stone's position and with the duties that encompassed it. He gave some idea as to what Stone's duties were with reference to a president and a general manager, isn't that correct?

The Witness: Yes, sir, that's correct, sir.

The Referee: Now, Mr. La Shelle's question now, in all probability, is preliminary to the next question he is going to ask, is that correct, Mr. La Shelle?

Mr. La Shelle: But we made a motion——

(Testimony of David F. Logan.)

The Referee: Now, do you recall——

Mr. La Shelle: We would like to have the Court's ruling on that motion with reference to a monarch.

The Referee: It may go out. Do you recall the answer that you gave at our last hearing when Mr. Fisk asked you with reference to the duties of Stone as general manager and president? [2200]

The Witness: Not clearly, sir.

Q. Let me ask you this, Mr. Logan. During the time that you were up there, did you know how the stock ownership was held as to Franciscan? Not what you know now, but what you knew then.

A. By hearsay, yes, sir.

Q. And what was your knowledge? What you were told as to stock ownership.

A. At the end or at the beginning.

Q. During the time that they were working after it was incorporated.

A. During the incorporation period?

Q. Yes.

A. And you wish me to answer how it was held——

Q. No, what knowledge you had at that time in your own mind, whatever source.

A. My knowledge in my own mind from the incorporation of the first director's meeting that I attended until the last, which was the two meetings—the first and the last—was that 50 percent of that was owned by Glaser Bros. and/or Barnhill

(Testimony of David F. Logan.)

and 50 percent was owned by Hedgeside and/or Stone.

Q. Now, with reference to this Petitioner's Exhibit No. 6, the warehouse receipt that I just asked you about that you signed, you knew, of course, at the time you signed it that that receipt was being given to the bank for borrowing purposes, did you not? A. Naturally.

Q. You assumed that. Now, I notice that that warehouse [2201] receipt, if you will look at the bottom of it where it says "lot number, storage per handling," etc. that there is no storage and no handling charge on that. Now, do you know who made the determination that there would be no storage charges and no handling charges on that particular receipt?

A. There would only be one person who could make that determination.

Mr. La Shelle: We ask that the answer go out as not responsive, your Honor.

A. Do I know? No, sir.

The Referee: His answer may go out. Do you know who made that determination?

The Witness: May I answer that?

The Referee: That's the question now. Do you know? A. Do I know? Yes, sir.

Q. Who made that determination?

A. Stone.

Q. Did you have anything to do—were you consulted at all about it? A. No.

(Testimony of David F. Logan.)

Q. You knew nothing about it. I think you stated Thursday that the handling charges and in and out charge—

A. In or out, yes.

Q. In other words, if the handling charges denoted there are 25 cents as it was on these other receipts, according to your interpretation, does that mean that 25 cents charge when it comes in and 25 cents when it goes out?

A. Yes, sir.

Q. So actually the charge is 50 cents.

A. Yes, sir. [2202]

Q. Now, in your testimony Thursday, you stated that you signed checks for Franciscan, that's correct, is it not?

A. That's correct, yes.

Q. And that usually when you signed a check for Franciscan, there were two signatures to the check.

A. Yes.

Q. And I think you made some mention, if my notes are correct, that Stone was the only one that could sign the checks alone.

A. The principal other one. The standard was that Stone and I generally signed all of them.

The Referee: Yes, but Mr. La Shelle's question now is could Mr. Stone sign a check by himself without any other signature.

A. Yes, sir.

Q. Now, with reference to those checks for Franciscan, do you remember what bank that was?

A. Franciscan.

Q. Yes.

A. American Trust Company.

Q. And did you and Mr. Stone and any others

(Testimony of David F. Logan.)

sign the usual card that the bank requires for signatures for a checking account?

A. We would have to, yes, sir.

Q. And it was that card that made provisions as to who would sign. A. Yes, sir.

Q. Is that right? A. Yes, sir.

Mr. La Shelle: We move, therefore, your Honor, that the part of the witness' testimony with reference to who could sign checks be stricken upon the grounds [2203] that the card at the bank is the best evidence of that setup.

Mr. Fisk: Well, I submit, your Honor, that the card at the bank is not the best evidence. The bank has no control over what the officers of the corporation do among themselves and furthermore, the testimony was what they did.

The Referee: Overruled.

Mr. Fisk: I think this was a motion to strike, your Honor.

The Referee: Oh. Motion denied.

Mr. La Shelle: Well, I think overruled can be construed as denied, can't it?

Q. Do you recall, Mr. Logan, approximately for what period of time Franciscan operated an IRBW? A. No, I cannot, sir.

Q. Do you recall whether it was a year approximately, or six months or eighteen months?

A. No, sir, I cannot.

Q. Do you recall what year it was in operation?

Mr. Walsh: Your Honor please, there are the

(Testimony of David F. Logan.)

records of the distillery. Aren't they the best evidence?

The Referee: Are they here, Mr. Walsh?

Mr. Fisk: Yes, the warehouse receipt book is and that was the objection I was confronted with when I asked Miss Wilcox the same question.

Mr. La Shelle: I am not trying to prove that. I am trying to find out this witness' knowledge as to the operations up there, to test his recollection.

The Referee: You may answer. Overruled.

A. No, sir, I cannot fix the exact date when it started.

Q. I am not asking the exact date; I am asking approximately and roughly for what period of time—six months, a year, a year and a half?

A. It was in operation in 1948.

Q. Could you give us any estimate in months at all?

Mr. Walsh: He said he could not, your Honor. He has already answered that question.

The Referee: Can you answer that? Can you say what part of 1948 it was in operation?

A. In my judgment, all of '48.

Q. And I take it you resigned from the board of both Franciscan and Hedgeside.

A. Yes, sir, as of June, 1949.

Q. And for how many years were you associated in business with Mr. Stone, approximately?

A. Ten.

Q. Did you ever have any knowledge while you

(Testimony of David F. Logan.)

were up there—What I am trying to do is to distinguish what you may know now and what you knew then. You follow me there, don't you?

A. Yes, sir.

Q. Before Hedgeside went into business, sometime in '49 while you were still up there before you resigned, while you were up there, did you know or have any knowledge imparted to you by anyone as to any sales of whiskey from Franciscan to [2205] Hedgeside?

A. From Franciscan to Hedgeside?

Q. To Hedgeside. A. No, sir.

Mr. La Shelle: I have no further questions, your Honor.

The Referee: Mr. Walsh, you indicated to the Court you wanted to ask Mr. Logan some questions?

Mr. Walsh: Yes, your Honor.

The Referee: Do you prefer to do it now or after Mr. Fisk?

Mr. Walsh: I think I would prefer to wait.

The Referee: Mr. Fisk?

Redirect Examination

By Mr. Fisk: Q. Mr. Logan, would you state in a general way what powers of a corporate officer Mr. Stone exercised in connection with the business of Hedgeside and Franciscan during the years '46, '47 and '48?

(Testimony of David F. Logan.)

Mr. La Shelle: We make the same objection, your Honor, as heretofore noted.

The Referee: Overruled.

A. Well, I don't—Will you read the question back please?

(The last question was read by the Reporter.)

Mr. Fisk: I'll reframe the question.

The Witness: I don't understand the question.

Mr. Fisk: Well, I'll reframe it.

Q. During the years '46, '47 and '48 in a general way, state what you observed Mr. Stone did in the form of operating [2206] Hedgeside and Franciscan?

A. In my own words, may I do that?

Mr. La Shelle: Well, this certainly would not be proper redirect. He went into that at some length, your Honor.

Mr. Fisk: Well, your Honor, that was the very question he asked. He asked the witness about whether or not he previously stated that Mr. Stone exercised the normal office of president and manager and I want him to explain it.

The Referee: You may answer in your own words what he did—what you observed him doing.

A. Mr. Stone's daily or weekly operation as observed by me of his duties and how he performed them, was basically as follows: He showed up at Hedgeside at 10 or 10:30 in the morning, he issued certain intructions to Mr. Robert, who was the superintendent of production, he carried on certain

(Testimony of David F. Logan.)

other business on the phone, he spent some time there and about once in every two or three weeks, he went to Mountain View and looked around and came back to Hedgeside. The point I am trying to explain, if I may, is that he spent the major portion of his time at headquarters, which was Hedgeside, and in his office or around there.

Q. Well, now, you have worked for other corporations than Hedgeside and Franciscan, have you not? A. Yes, sir.

Q. And you observed how the president of a corporation [2207] functions, is that right?

A. Yes, sir.

Q. Now, did Mr. Stone during these years '46 to '48, function as president of Franciscan and Hedgeside according to observations as these other presidents did?

Mr. La Shelle: Just a moment, we object to that, your Honor. That is no criterion in this case from any standpoint as to whether Mr. Stone performed the office of president the way he has seen other presidents in other companies perform them.

The Referee: Sustained.

Q. During the years '46 through '48, did you ever at any time observe anyone connected with either of said corporations, overrule any decision of Mr. Stone?

Mr. La Shelle: Just a moment. Read that question to me please?

(The last question was read by the Reporter.)

(Testimony of David F. Logan.)

Mr. La Shelle: We make the same objection as heretofore noted.

The Referee: Overruled.

A. Emphatically, no.

Mr. Fisk: That's all.

The Referee: Mr. Walsh?

Redirect Examination

By Mr. Walsh: Q. Mr. Logan, during the time that you were connected with the Hedgeside Distillery Corporation, did you ever have any opportunity or occasion to examine the bonded warehouse, that is, [2208] IRBW No. 2 located on Hedgeside's premises? · A. Yes, sir.

Q. And did you ever examine the setup regarding the way that the barrels of spirits and whiskey were placed in the warehouse? A. Yes, sir.

Q. Can you tell us how you did that?

A. How I examined it?

Q. Yes.

A. Well, inasmuch as storage of goods has a marked effect on the end on its salability, it was a point of interest to me and your question, if I understand it, is to describe the operation.

Q. That's correct.

A. Well, a barrel of whiskey or spirits or brandy, or whatever we call in the broad sense, spirits, came from Mountain View by truck or it came from Hedgeside by being rolled on to a platform where it was inspected, where the wheel of

(Testimony of David F. Logan.)

the numbers were put on to it giving its official birth certificate by the government, it was weighed to ascertain its true governmental weight, all of the records were made by the government and assisted by the employees of Hedgeside; it was then approved for putting into the rack, it was rolled into the warehouse, rack space was made available and the lift truck lifted from the catwalk to its respective rack. These racks were in a series of fifteen denominations deep. They went in numerically either forwards or backwards so they could be gotten out without scrambling. In other words, the first one in last or the last [2209] one in first; the bungs were inspected and the barrel came to rest with the bungs straight up.

Q. Now, Mr. Logan, was there any marking on any of those barrels that were stored at IRBW No. 2 which would show or indicate in any way the ownership of that spirits or whiskey?

A. Emphatically not, sir.

Q. Were the barrels of distilled spirits and whiskey stored in a particular section or set off for any particular owner or buyer?

A. No, sir.

Q. Mr. Logan, you testified both on direct examination by Mr. Fisk and cross examination by Mr. La Shelle, that you only attended two meetings of the board of directors of the Franciscan Farm & Livestock Company.

A. That's correct, sir.

(Testimony of David F. Logan.)

Mr. La Shelle: We make the same objection as heretofore noted, your Honor.

The Referee: Overruled.

Q. Now, during that time, did Mr. Stone consult you in any way about the activities of Franciscan Farm & Livestock Company? By that I mean, did he discuss with you any loans that were made by Franciscan? A. No, sir.

Q. He did not. A. No.

Q. Now, did he discuss with you at any time the placing of any of the Franciscan production in the Hedgeside IRBW No. 2 bonded warehouse?

Mr. La Shelle: We make the same objection, your [2210] Honor.

The Referee: Overruled. What is your answer, Mr. Logan? A. He did not.

Q. Can you tell us approximately how many years you were a director and officer of Franciscan?

Mr. La Shelle: We make the same objection, your Honor.

The Referee: With reference to that, we have the minute book, do we not?

Mr. La Shelle: Yes.

Mr. Walsh: It isn't here now.

The Referee: Well, it's in evidence, Mr. Walsh.

Mr. Walsh: Well, I'll reframe my question.

Q. During the time that you were an officer and director of Franciscan Farm & Livestock Company, did you attend any meetings of the stock-

(Testimony of David F. Logan.)

holders and directors where any directors were re-elected to office?

Mr. La Shelle: We make the same objection, your Honor, as heretofore noted.

The Referee: Overruled. Did you?

Mr. Walsh: With the exception——

A. No.

The Referee: What is the answer?

The Witness: No.

Mr. La Shelle: I hardly think the witness would [2211] attend a stockholder's meeting.

The Referee: No, but he said stockholders and directors.

Q. Now, Mr. Logan, you testified on direct examination that Mr. Stone conducted the normal functions that a president and manager would do of a corporation. Can you tell me what you mean by that?

Mr. La Shelle: We make the same objection as heretofore noted, your Honor.

The Referee: You may answer. Overruled.

A. What I meant to imply, if I may clarify it, I have a very clear-cut definition of the true functions of a president and general manager and if I may *definite* what they are then you can—then I may go from there.

Mr. La Shelle: We object to any definition of that, your Honor. The bank already has in evidence the by-laws and the articles of incorporation, which

(Testimony of David F. Logan.)

is the best evidence as to the powers of a president and general manager in this case.

The Referee: Sustained. Read Mr. Walsh's question, please.

(The last question was read by the Reporter.)

Mr. Fisk: If the Court please, if I may enter my statement, it seems to me that the witness is attempting to answer the question by explaining his idea of what the functions of a president and manager are and then [2212] what he did, if I understand him correctly.

The Witness: Yes.

Mr. Fisk: It has nothing to do with what the by-laws or the articles of incorporation provide.

The Referee: Can you answer Mr. Walsh's question without giving us your definition of—

The Witness: Yes, sir.

The Referee: Will you answer Mr. Walsh's question?

The Witness: From my observation, was that the question?

The Referee: Read Mr. Walsh's question.

(The last question was re-read by the Reporter.)

A. What I mean by that is he held the powers entrusted to a president and general manager to hire, to fire, to borrow, to do as he pleased in that office in its entirety.

Mr. La Shelle: We ask that the witness' state-

(Testimony of David F. Logan.)

ment that he can do as he pleases in its entirety go out as conclusion.

The Referee: He said that's what he means.

Mr. Fisk: That is exactly the question.

Mr. La Shelle: We submit it, your Honor.

The Referee: Overruled.

Q. Now, Mr. Logan, did Mr. Stone at any time ever discuss with you as a director and officer of Franciscan, any of the policies of the corporation?

A. No, sir.

Mr. La Shelle: We make the same objection, your [2213] Honor.

The Referee: Overruled.

Q. Did he ever discuss with you at any time how the distillery should be operated?

A. No, sir.

Mr. La Shelle: Same objection, your Honor.

The Referee: Overruled.

Q. Did he ever discuss with you at any time the financial condition of Franciscan?

A. No, sir, he did not.

Mr. La Shelle: We make the same objection.

The Referee: Overruled.

Mr. La Shelle: It would be easier, Mr. Logan, if you wait for my objection before you answer the question.

The Witness: I apologize.

Mr. La Shelle: It would be easier on the court reporter, I mean.

Q. In other words, Mr. Stone conducted this

(Testimony of David F. Logan.)

corporation as if he owned the whole thing himself?

Mr. La Shelle: Just a moment, your Honor. We will object to that as calling for the conclusion and opinion of the witness.

Mr. Walsh: I am entitled to lay a foundation, if your Honor please.

The Referee: Sustained.

Q. You testified also that you were an officer and director of Hedgeside?

A. Yes, sir. [2215]

Q. Did Mr. Stone at any time consult you as an officer or director of Hedgeside on any matters regarding the financial condition of Hedgeside Distillery?

A. He did not.

Mr. La Shelle: Same objection, your Honor.

The Referee: Overruled.

A. He did not, sir.

Q. Did you at any time ever attend any meetings of the board of directors of Hedgeside Distillery whereby Stone as president and manager was authorized to borrow any money?

Mr. La Shelle: We make the same objection, your Honor.

The Referee: Overruled.

A. Not to my knowledge.

Q. Did you attend any meetings of the Board of Directors of Hedgeside—

Mr. La Shelle: Wait a minute. Same objection, your Honor.

(Testimony of David F. Logan.)

Mr. Walsh: You better let me finish.

The Referee: Wait until he is finished, Mr. La Shelle.

Mr. La Shelle: I'm sorry.

Mr. Walsh: Would you read that—just that part—for me?

(The last question was read by the Reporter.)

The Referee: Overruled.

Q. (Continuing) where there was a resolution made authorizing Stone as president and manager to enter into any contract [2216] with Schenley?

Mr. La Shelle: Are you through?

Mr. Walsh: Yes.

Mr. La Shelle: We make the same objection, your Honor, as heretofore noted.

The Referee: Overruled. A. No, sir.

Q. Did you ever read any minutes of any special meeting and approve the actions of Stone in making and entering into a contract, a production contract with Schenley?

Mr. La Shelle: We make the same objection.

The Referee: Just a minute, Mr. Walsh, before I rule on Mr. La Shelle's objection. You have two questions in there. It is entirely possible that the witness has read these resolutions subsequent to the hearing, at least during these court proceedings.

Mr. Walsh: Well, I'll—

The Referee: If you reframe it and then permit Mr. La Shelle to make the objection.

Mr. Walsh: I'll reframe my question.

(Testimony of David F. Logan.)

Q. Did you at any time prior to the filing of the petition in bankruptcy, which was in June, 1949, ever read any minutes of the meetings of the Board of Directors of Hedgeside Distillery Company where Mr. Stone was authorized to enter into a production contract with Schenley?

Mr. La Shelle: We make the same objection, your [2217] Honor.

The Referee: Overruled.

A. Not to my knowledge.

Q. Did you approve any such minutes?

Mr. La Shelle: Now, just a moment. What do you mean by approve? Did he sign them?

Mr. Walsh: Your Honor, I think the question is——

Mr. La Shelle: We will object to the question, your Honor, as not proper cross-examination and calling for his conclusion and opinion as to how he could approve it.

The Referee: Do you understand what Mr. Walsh means when he asks whether or not you approved?

The Witness: No, sir.

Q. Then I'll ask this question. Did you ever sign any minutes of the meetings of the Board of Directors relative to a Schenley production contract?

Mr. La Shelle: That is of Hedgeside or——

Mr. Walsh: Of Hedgeside.

Mr. La Shelle: Same objection, your Honor.

(Testimony of David F. Logan.)

The Referee: Overruled.

A. Not to my knowledge.

Q. Did Mr. Stone at any time consult you as an officer and director of either Hedgeside or Franciscan relative to the business dealings between Franciscan and Hedgeside?

Mr. La Shelle: We make the same objection, your [2218] Honor.

The Referee: Overruled.

A. No, he did not.

Q. Did he at any time ever consult you regarding the financial operations between Hedgeside and Franciscan?

Mr. La Shelle: We make the same objection, your Honor.

The Referee: Overruled.

A. He did not.

Mr. Walsh: I think that's all.

The Referee: Mr. La Shelle, by reason of the fact that the trustee does have a different defense, you can cross-examine the witness.

Mr. La Shelle: Just one question here.

Mr. Walsh: Just a minute, your Honor please, I didn't call this witness.

The Referee: I understand that, Mr. Walsh, but by reason of the fact that you and Mr. Fisk have had an opportunity to examine this witness on direct and then on redirect and you were permitted to withhold your examination until last and did come up with a new subject with reference to the

(Testimony of David F. Logan.)

stacking of the barrels and the loading of them and so forth, the Court will permit Mr. La Shelle to cross-examine.

Mr. Walsh: As to the entire matters I brought up—

The Referee: As to the new matters that you brought [2219] up, Mr. Walsh.

Recross-Examination

By Mr. La Shelle: Q. I'll show you again warehouse receipt No. 3472-B, which is part of Bank's Exhibit No. 6 and following the word whiskey after the barrels, are the initials "S-N." That means serial number, doesn't it? A. It does.

Q. And then the numbers that follow that are the actual serial numbers.

A. That is correct.

Q. And those serial numbers are either burned or imprinted in some manner on the barrels when they're stored in the IRBW, is that right?

A. They're stamped in with a sharp tool.

Q. Yes. So that the serial numbers appear on the barrels. A. Yes, sir.

Q. And that is customary in Internal Revenue Bonded Warehouses to have the serial numbers on the barrels and that's all. A. No, sir.

The Referee: What is the answer?

A. No, sir.

Q. What is customary?

The Witness: May I answer it?

(Testimony of David F. Logan.)

The Referee: Just what is customary.

A. The barrel is based like this (indicating)——

Mr. Walsh: Round, you mean.

A. (Continuing) It's round. Across here is the maker (indicating). [2220]

The Referee: Mr. Logan, let me interrupt you. The court reporter, when you say across here, makes no indication as to what here is, so if you say around the top or something——

A. (Continuing) Around the top of the end is the name of the maker, his address is under that, his license number given to him by the government is under that; the net and the tare and the gross are stamped in under that, and the last is the—to the left is the word whiskey or spirits or brandy or rum and to the right of that word is the serial number.

Q. That's all done by the government gauger?

A. No, sir.

Q. No, I mean the barreling down is—I'll withdraw that. The barreling down as to what actually goes in a barrel, that's all done by the gauger.

A. No, sir.

Q. Well, didn't you tell me that the government men did that with the help of the——

A. No, sir.

Q. How does the government know what's in there for tax purposes?

The Referee: How does the government know what's in there for tax purposes?

A. The government man stands here (indicating), the employees——

(Testimony of David F. Logan.)

Mr. Fisk: Just a minute. What do you mean by "here"?

A. (Continuing) Well, here by the scale.

The Referee: On the right side. [2221]

A. (Continuing) On the right side of the scale, the employees of the company are technically his servants, they do the manual labor, they put the spirits into the barrel, they bung the barrel, they weigh the barrel, they stamp the barrel, they remove the barrel, or the government man does, write the numbers on the government form which is on the table by the scale.

Q. That's the storekeeper-gauger, isn't it?

A. Yes, sir.

Mr. La Shelle: That's all, your Honor.

Re-Direct Examination

By Mr. Walsh: Q. Now, Mr. Logan, in your experience——

Mr. La Shelle: Your Honor, is there any reason here for further——

The Referee: Well, just further redirect with reference to this stacking and the labeling and the spirits that go into the barrel.

Q. Now, Mr. Logan, from your experience and familiarity with the operations of the Hedgeside Distillery and IRBW bonded warehouse No. 2, if I went up there and got a release from Mr. Stone for a barrel of distilled spirits and paid the tax on it, would I know who owned that particular barrel

(Testimony of David F. Logan.)

of spirits, even though the serial number was on it?

Mr. La Shelle: We object to the form of that question, your Honor. It presents a hypothetical case that plays no part here. [2222]

Mr. Walsh: Well, he knows about the operation of the distillery. I am merely asking him——

The Referee: You may answer.

The Witness: Would you read Mr. Walsh's question to me again please?

(The last question was read by the Reporter.)

Mr. La Shelle: I would like to add to that objection, your Honor, that the only way he could do that would be to surrender a warehouse receipt or some form of ownership. You can't just go in and pay the tax and get a barrel of goods out of there.

The Referee: Is that a fact, Mr. Logan?

The Witness: No, sir.

The Referee: Is Mr. La Shelle's statement correct?

The Witness: No, sir.

The Referee: Then you answer Mr. Walsh's question.

A. You would have no way of knowing who owned that barrel.

Q. Mr. Logan, would I have to present to the government storekeeper gauger of the Hedgeside Distillery IRBW No. 2 bonded warehouse a warehouse receipt in order to have the government release that barrel of spirits or whiskey?

(Testimony of David F. Logan.)

Mr. La Shelle: We object to the form of that question, your Honor. The requirements of what it is to take spirits any time out of bond are fully covered by ATU regulations and red tape and the forms and what you have got to do. The government here is only interested [2223] in the tax; they don't care who owns the barrel.

Mr. Walsh: Will you stipulate that? Will you stipulate that the government is not interested—

Mr. La Shelle: I am not entering into any stipulation. I am making an objection.

The Referee: Overruled. You may answer the question.

The Witness: Will you read it back to me, please?

(The last question was read by the Reporter.)

A. You would not.

Mr. Walsh: No further questions.

By the Referee: Q. What would I have to do?

A. Nothing.

Q. You mean I could go up there and help myself to a barrel—

A. Providing, of course, your Honor, that you had the legal licenses and I am assuming that Mr. Walsh is a rectifier or bottler of spirits. He wouldn't just be an individual. He couldn't just be an individual. He should be a person in the trade so that he could take legal possession of the merchandise. I am assuming that he has those licenses.

(Testimony of David F. Logan.)

Mr. La Shelle: Well, I am assuming that I am a licensed dealer in——

A. (Continuing) A wholesaler, and you have the legal licenses to do it or you could even be a person who made cakes and pies over here in San Rafael, having the legal license to [2224] make rum and brandy or whatever it may be, you can take possession of the merchandise and go away with it.

Q. Then you answer this question for me. Assuming that I am legally entitled to it from the standpoint of having a license and I want to take a barrel of spirits out of IRBW No. 2 at Hedgeside, how would I get the barrel? What would I have to have so no one would stop me at the door walking out with a barrel of whiskey?

A. Very simple, sir. You would contact the management of IRBW No. 2, which in this case would be Mr. Stone; you would request Mr. Stone to have an actual tare made of the spirits to take care of the statutory losses so that you can determine the tare figure. That would be done by the help of that corporation, a paper would be made out which would stipulate that for government purposes, it would be sent to the Collector of Internal Revenue on McAllister Street, the tax would be paid on the actual tax goods with the statutory allowance deducted for the number of years or months, a green stamp would be handed back to the servant of the Hedgeside corporation, that stamp would be returned to the cashier or the officer in charge at Hedgeside, he in turn would

(Testimony of David F. Logan.)

take or have taken the barrel out of the rack and put the stamp properly torn on the end of the barrel. Those are the things done by the servant, which in this case would be the corporation. Then you, as Abrott & Company, could appear with your truck or anybody's truck, take legal possession of the merchandise and go away with it, take it [2225] to your place of business.

The Referee: Is that all, gentlemen?

Mr. La Shelle: I would like to ask this.

By Mr. La Shelle: Q. In other words, if I want to go up and tax-pay 9,000 barrels of spirits that are just there now, I can go up and tax-pay them and take that without presenting any warehouse receipt or evidence of ownership?

Mr. Walsh: Just a minute, your Honor please, I object to that as improper examination. He says "now; I can do it now." Well, "now" is confined solely to the operation prior to the filing of the petition in bankruptcy.

The Referee: We are not concerned with now anyway, are you, Mr. La Shelle?

Mr. La Shelle: Well, when you withdraw something, you have to get the warehouseman to agree to give it to you, as well as the government, don't you? Is the warehouseman going to give it to anybody that tax-pays it?

The Witness: Is that a question?

The Referee: Yes.

A. The warehouseman is the custodian of the keys in the sense that the bank is the custodian of

(Testimony of David F. Logan.)

the keys. If he wishes it, he can give it to you. He could give you your merchandise (indicating) or your merchandise (indicating) or your merchandise [2226] (indicating). The government is not interested in that aspect whether there's a warehouse receipt or a bill of lading or an invoice or anything. He isn't interested.

By the Referee: Q. Well, let's go beyond the government. Supposing I have taken care of the government along the lines that you say. Don't I have to make peace with either Hedgeside, whom I am buying it from or from the warehouse or someone else? A. Yes.

Q. What are the mechanics of that end of the transaction?

A. All right, we'll start all over again. You, J. B. Abrott & Company, and you being president of it, appeared on the premises either in person or by telephone call and you asked Stone or his agent to sell you a barrel of whiskey. The next question is what's the price? It's \$1.15 or 17, in which case money must change hands but no warehouse receipt is involved, you're not interested. Ultimately, for government records you would have to show that that was sold to J. B. Abrott & Company because it was moved out.

Q. Well, what does Stone give me? Now, this has nothing to do with the government tax angle. Supposing a barrel of whiskey cost me \$200 and I gave Stone \$200 and he said, okay, you have a barrel of whiskey. Now, does Stone go and get the

(Testimony of David F. Logan.)

barrel for me or does he give me a slip and I go somewhere? A. He gives you an invoice.

Q. And what do I do with it? [2227]

A. You take it home with you.

Q. Yes, but I want to take the whiskey with me.

A. The invoice has no bearing on that problem. All Stone does is to say to his servant: "Go get the barrel out." It's tax paid. And that's the end of it and you take it home with you.

By Mr. La Shelle: Q. May I ask what the mechanics are to get a barrel out when there is a warehouse receipt issued outstanding covering the barrel? What are the mechanics there with the warehouseman as distinguished from the government?

A. In that case, you are J. B. Abrott & Company, you have a warehouse receipt number which the owner of the warehouse and the distillery would not be foolish enough to surrender physical merchandise, that serial number without your surrendering the warehouse receipt back to him first, money notwithstanding.

The Referee: So I gave him the warehouse receipt.

The Witness: Yes, sir.

Mr. Fisk: I ask that that statement go out as a conclusion of the witness that the owner of a warehouse would not be foolish enough. It's a question of what is the practice of Hedgeside if he wants to testify to that.

(Testimony of David F. Logan.)

The Referee: So ordered. Are you finished with Mr. Logan, gentlemen?

Q. In other words, the general mechanics are you got ten [2228] barrels of whiskey and a warehouse receipt, you want to withdraw five, you submit your warehouse receipt, they make a notation on the back that five barrels are withdrawn and then they go through the other mechanics you have described. A. That's right.

Mr. La Shelle: That's the general practice. That's all.

Mr. Fisk: I would like to ask a couple of questions.

Re-Redirect Examination

By Mr. Fisk: Q. In the light of your knowledge of the way an internal revenue bonded warehouse was operated, whenever there was outstanding a warehouse receipt, we will say a hundred barrels of whiskey or grain spirits and the person who owned that warehouse receipt wanted to withdraw twenty barrels, was he permitted to withdraw twenty barrels without surrendering the original warehouse receipt and having it marked on the back that twenty barrels were withdrawn, or not?

A. Yes, sir.

Q. And that was a practice that existed at Hedgeside through the years '46 through '48, is that not true? A. Yes, sir.

Q. To permit partial withdrawals without a re-

(Testimony of David F. Logan.)

turn of the original warehouse receipt, is that correct? A. Yes, sir.

By Mr. La Shelle: What evidence would Hedgeside in such an instance make of the withdrawal?

A. A note could be made and the customer ultimately—maybe in a week or two weeks or three weeks, could enter that on the back of his non-negotiable, which might be pledged elsewhere, [2229] like in a bank.

Q. Would you say that there are no instances where Hedgeside noted withdrawals on the back of the warehouse receipt—partial withdrawals?

A. No, I would not say there was no instances.

Mr. La Shelle: That's all, your Honor.

By Mr. Fisk: Q. But you would say there were many instances where they didn't.

A. There were more where they didn't than where they did.

The Referee: Mr. Logan, thank you very much.

The Witness: Thank you, your Honor.

The Referee: I see the gentlemen kept their promise. It's not twelve. You're excused.

Mr. Fisk: Your Honor, I would like to offer this exhibit in evidence. It's a certified copy.

Mr. Casey: While Mr. La Shelle is reading that, here is Bank's 10, which you said was still missing.

Mr. La Shelle: We will object to that, your Honor, on the grounds it is incompetent, irrelevant and immaterial and particularly, that there is no foundation laid whatsoever for the testimony. There

is no evidence whatever in this case that the Hedgeside warehouse involved in this case is a public warehouse as distinguished from a private warehouse and the rates of public warehouses are of no evidence in this case to show whether or [2230] not Hedgeside, acting as a private warehouse, could or would or did or did not make a profit.

The Referee: You don't raise any objection with reference to the certification?

Mr. La Shelle: No, not as to that, your Honor.

The Referee: Objection overruled. The schedule of tariff pages signed by the Secretary of the Public Utilities Commission, State of California, dated the 10th day of October, 1950, the certification is dated the 10th day of October, 1950, and there are attached—

Mr. La Shelle: What number is that?

The Referee: Thirty-five. There are four sheets attached to the certification, Respondent Bank's Exhibit No. 35. The first one is issued the 21st day of January, 1949, its effective date is March 1, 1949; the second one was issued December 26, 1941, effective date January 15, 1942; the next one was issued August 21, 1939, effective date October 10, 1939; and the last one issued July 14, 1947, effective date September 1, 1947—Respondent Bank's Exhibit No. 35 in evidence.

(The documents referred to were received by the Referee and marked "Respondent Bank's Exhibit No. 35 in Evidence.")

The Referee: Mr. Fisk has offered the Court a document and he is now making a statement preliminary to offering it, I assume.

Mr. Fisk: The record will show that the Court sustained the objection to any testimony that Hedgeside or Franciscan had not filed their rates with the Public Utilities Commission and accordingly I would like to offer this affidavit or certificate of the Commission to show neither of them has ever filed their rates with the Public Utilities Commission.

Mr. La Shelle: Well, let me see if I understand you. Is this in connection with your storage-for-profit theory, Mr. Fisk?

Mr. Fisk: It's in connection with the entire case.

Mr. La Shelle: We object to it, your Honor, upon the grounds it's incompetent, irrelevant and immaterial and no foundation laid for this testimony and there is no showing that Hedgeside was operating a Public Utilities warehouse—such a private warehouse.

Mr. Fisk: We are not contending that.

The Referee: The objection is overruled and a document dated San Francisco, California, the 5th day [2483] of December, 1950, signed by secretary, Public Utilities Commission, State of California—I can't make out the name—becomes Respondent Bank's No. 47.

(The document referred to was received by

the Referee and marked "Respondent Bank's Exhibit No. 47.)

Mr. Walsh: Your Honor please, I was under the misapprehension that the claims of creditors in this bankruptcy proceeding had been offered in evidence. I was advised they were not. So as part of my case, I would like to offer in evidence, all of the verified claims of creditors on file in the bankruptcy proceedings in this reclamation proceeding.

Mr. Fisk: May I ask a couple of question on that, Frank? I'm not as well versed in those matters as you are. Would that mean the ones that are on file here? In other words——

The Referee: Seventy-two claims.

Mr. Fisk: How many?

The Referee: Seventy-two that have been filed.

Mr. Fisk: Seventy-two that have been filed. In other words, you could be scheduled in the schedules, but if you did not file a claim, you would not participate in any dividend that would be paid and Mr. Walsh is not offering those creditors. He is offering the claims which will indicate each creditor who has filed a claim in these proceedings, regardless of whether he [2484] is——

The Referee: Scheduled or not. There are seventy-two of them.

Mr. La Shelle: These are all claims against the Hedgeside Distillery Corporation, the bankrupt.

Mr. Walsh: That's right, they are all verified claims.

Mr. La Shelle: We have no objection to them in-

sofar as Hedgeside's production is concerned, but as to Franciscan's production we are petitioning to reclaim, we object to the creditors' claims being incompetent as to Franciscan's production, your Honor.

The Referee: Very well, the claims will be received in evidence as Trustee's Exhibit No. 1.

(The claims referred to were received by the Referee as "Trustee's Exhibit No. 1.")

Mr. La Shelle: I take it my objections are overruled.

The Referee: The only value they would have would be with reference to the Hedgeside matter anyway.

Mr. La Shelle: Let me explain what I had in mind there, your Honor. All of the goods are in the possession of the bankrupt in its bonded warehouse No. 2. However, the record at least shows that a certain amount of that production was Hedgeside production.

The Referee: Well, some was produced elsewhere. [2485]

Mr. La Shelle: Some was produced at Franciscan. My objection is it should be limited to the Hedgeside production.

The Referee: Mr. Walsh, did you hear Mr.—

Mr. Walsh: No, I didn't, your Honor; I'm sorry.

The Referee: Mr. La Shelle has no objection to the receipt in evidence of these claims, but he does object to the receipt in evidence of the claims

insofar as the Franciscan production is concerned, but he has no objection insofar as Hedgeside's production is concerned.

Mr. Walsh: No, your Honor please, I want these claims to go in evidence without any reservation whatsoever. Now, your Honor well knows the law regarding 3440 and also property in possession of the bankrupt. Now, if at the time this property was in the possession of Hedgeside Distillery Corporation, certain creditors extended credit to Hedgeside Distillery is quite material in the trustee's case regardless of Franciscan's status.

Mr. La Shelle: Your Honor, as I understand, the purpose of the offer is simply to show that there are creditors in such and such an amount and they filed claims. I don't know whether they have been prepared or not or anything of that nature, but the question of 3440 and its application here and 3440.5 and matters of [2486] law to be determined, how you can introduce the creditors' claims against Franciscan, I don't know. The fact that these creditors' claims have been filed against Hedgeside is a part of the record and as far as I think, they don't even need to be introduced. They're all part of the record here in the bankruptcy proceedings and I just regard them as such.

Mr. Fisk: If the Court please, these claims are offered in evidence in this proceeding.

The Referee: As Respondent's and Trustee's Exhibit No. 1.

Mr. Fisk: Right, for whatever purpose they

serve in the proceeding. You cannot segregate them as to Franciscan or Hedgeside.

The Referee: Objection is overruled. Respondent-Trustee's Exhibit No. 1 is the claims file containing the 72 claims filed in the bankruptcy proceeding.

* * * * * [2487]

[Endorsed]: Filed March 6, 1952.

[Endorsed]: No. 13600. United States Court of Appeals for the Ninth Circuit. Anglo California National Bank of San Francisco, Appellant, vs. Schenley Industries, Inc., a corporation, Appellee. Charles W. Ebnother, Trustee of the Estate of Hedgeside Distillery Corporation, bankrupt, Appellant, vs. Schenley Industries, Inc., a corporation, Appellee. Transcript of Record. Appeals from the United States District Court for the Northern District of California, Northern Division.

Filed: October 30, 1952.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13600

THE ANGLO CALIFORNIA NATIONAL
BANK OF SAN FRANCISCO,

Appellant,

vs.

SCHENLEY INDUSTRIES, INC.,

Appellee.

CHARLES W. EBNOTHER, Trustee of the
Estate of Hedgeside Distillery Corporation,

Appellant,

vs.

SCHENLEY INDUSTRIES, INC.,

Appellee.

APPELLANTS' STATEMENT OF POINTS
ON APPEAL

Pursuant to Rule 19(6) of the Rules of this Court, Appellant The Anglo California National Bank of San Francisco and Appellant Charles W. Ebnoter, Trustee of the Estate of Hedgeside Distillery Corporation, make this statement of points on which they intend to rely in this appeal.

1. The District Court erred in its Opinion and Order in not finding that the Trustee in Bankruptcy was entitled to retain exclusive possession of 5058 barrels of Hedgeside Distillery Corporation (herein

referred to as "Hedgeside") grain spirits production as against Schenley Industries, Inc. (herein referred to as "Schenley").

2. The District Court erred in said Opinion and Order in holding that Schenley is the exclusive owner of said 5058 barrels of Hedgeside grain spirits production and entitled to the immediate possession thereof.

3. The District Court erred in said Opinion and Order in finding and holding that Hedgeside was a warehouseman under the California Warehouse Receipts Act within the exception (3440.5 C.C.) to Section 3440 of the California Civil Code and not subject to said Section in the transfer of 5058 barrels of Hedgeside grain spirits to Schenley.

4. The District Court erred in said Opinion and Order in finding and holding that said Section 3440 has no application where the goods subject to transfer are stored in an Internal Revenue Bonded Warehouse.

5. The District Court erred in said Opinion and Order in that there was no evidence adduced to support a finding that Hedgeside was a warehouseman as defined by the California Warehouse Receipts Act.

6. The District Court erred in said Opinion and Order in finding that Schenley at any time held all the indicia of ownership for said Hedgeside grain spirits production.

7. The District Court erred in said Opinion and Order in holding that Section 3440 of the California Civil Code had no application to the purported transfer of said Hedgeside grain spirits production.

8. The District Court erred in said Opinion and Order in holding that transfers of the type involved in the purported sales of said Hedgeside grain spirits production to Schenley satisfied the provisions of Section 3440 of the California Civil Code treating with the requirements of "immediate delivery and actual continued change of possession."

9. The District Court erred in said Opinion and Order in not holding that the documents designated as "warehouse receipts" and given by Hedgeside to Schenley in connection with the purported transfer of Hedgeside grain spirits production are insufficient in law to avoid the effect of Section 3440 of the California Civil Code.

10. The District Court erred in said Opinion and Order in holding that Schenley was the owner of "valid warehouse receipts" covering Hedgeside grain spirits production.

11. The District Court erred in said Opinion and Order in holding that Hedgeside fell within the exemption provisions of Section 3440.5 of the California Civil Code in connection with the transfers of Hedgeside grain spirits production.

12. The District Court erred in said Opinion and Order in holding that the bankrupt, Hedgeside, was

a "warehouseman" as defined by the California statutes and was authorized to issue valid warehouse receipts in connection with the transfers of Hedgeside grain spirits production.

13. The District Court erred in said Opinion and Order in finding that the bankrupt, Hedgeside, was "in the business of storing goods for profit" in connection with the transfers of Hedgeside grain spirits production.

14. The District Court erred in said Opinion and Order in finding that the bankrupt, Hedgeside, charged a "reasonable" rate for storage of the Hedgeside grain spirits production on its premises.

15. The District Court erred in said Opinion and Order in finding that copies of warehouse receipts issued in connection with Hedgeside grain spirits production were kept "at the warehouse" where such goods were stored.

16. The District Court erred in said Opinion and Order in finding that Hedgeside stored its own grain spirits production in the regular course of its business.

17. The District Court erred in said Opinion and Order in holding that Hedgeside held State permits and licenses authorizing it to conduct a public warehouse within the meaning of the California Warehouse Receipts Act.

18. The District Court erred in said Opinion and Order in holding that the California Warehouse

Receipts Act has repealed Section 3440 in its application to the subject goods.

19. The District Court erred in said Opinion and Order in finding that the Bank, in accepting receipts from Hedgeside, relied solely on the mere possession of grain spirits by Hedgeside as a proprietor of a government bonded warehouse.

20. The District Court erred in said Opinion and Order in finding that the Bank, in accepting receipts from Hedgeside, was not misled or deceived or suffered detriment because of any act or omission on the part of Schenley.

21. The District Court erred in said Opinion and Order in holding that the California Warehouse Receipts Act was the exclusive statute governing for all purposes the transfer of title and ownership to Hedgeside grain spirits production.

22. The District Court erred in said Opinion and Order in holding that Hedgeside was at all times in question lawfully engaged in the business of storing goods for a profit.

23. The District Court erred in said Opinion and Order in finding that Hedgeside issued valid warehouse receipts for its grain spirits production stored in I.R.B.W. No. 2 including the receipts held by Schenley.

24. The District Court erred in said Opinion and Order in holding that Hedgeside was not a public

utility and not subject to the Public Utilities Act of California.

25. The District Court erred in said Opinion and Order in holding that the Anglo Bank has no interest in any of the Hedgeside grain spirits production.

26. The District Court erred in said Opinion and Order in holding that Hedgeside did not have any right, title or interest in the 574 barrels of Hedgeside grain spirits production except as Schenley's bailee.

27. The District Court erred in said Opinion and Order in holding that Schenley was the owner and holder of valid warehouse receipts for the 574 barrels of Hedgeside grain spirits production.

28. The District Court erred in said Opinion and Order in holding that Hedgeside charged a reasonable rate in the regular course of business for storage.

29. The District Court erred in said Opinion and Order in finding that the Bank, in accepting receipts from Hedgeside as to Hedgeside grain spirits production, relied solely on the mere possession of such spirits by Hedgeside as the proprietor of a bonded warehouse.

30. The District Court erred in said Opinion and Order in holding that Hedgeside was at no time clothed with the apparent ownership of the 574

barrels of Hedgeside grain spirits production but held only naked possession.

31. The District Court erred in said Opinion and Order in that there was insufficient evidence adduced to support the findings referred to in paragraphs 1 to 30, inclusive, above and each of them.

Dated: January 15, 1953.

/s/ FRANCIS P. WALSH,

/s/ HENRY GROSS,

/s/ JAMES M. CONNERS,

Attorneys for Appellant, Charles W. Ebnother,
Trustee in Bankruptcy.

/s/ FREDERICK M. FISK,

Attorney for Appellant, The Anglo California National Bank of San Francisco.

Of Counsel:

/s/ CHICKERING & GREGORY

Acknowledgment of Service attached.

[Endorsed]: Filed Jan. 15, 1953. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLANTS' DESIGNATION OF RECORD
ON APPEAL

Come now Charles W. Ebnother, Trustee in Bankruptcy, and The Anglo California National Bank of San Francisco, each appellants in the

above entitled cause, and state that the parts of the record as docketed in the above Court that each of them deems necessary to the consideration of their respective appeals are as follows:

1. Reclamation Petition filed by Schenley Industries, Inc.
2. Answer filed by Trustee in Bankruptcy.
3. Answer filed by The Anglo California National Bank of San Francisco.
4. Order on Reclamation Petition dated January 10, 1952, signed by Hon. Bernard J. Abrott, Referee in Bankruptcy.
5. Petition for Review dated February 19, 1952, taken by Charles W. Ebnother, Trustee in Bankruptcy, and The Anglo California National Bank of San Francisco.
6. Referee's Certificate on Petition to Review Relative to Schenley Industries, Inc., Petition for Reclamation dated March 5, 1952.
7. Opinion and Order of Hon. Dal M. Lemmon, United States District Judge, signed and filed August 18, 1952.
8. Notice of Appeal filed September 16, 1952, by The Anglo California National Bank of San Francisco.
9. Notice of Appeal filed September 16, 1952, by Charles W. Ebnother, Trustee in Bankruptcy.

* * * * *

12. Respondent Bank's exhibits 35 and 47 in evidence.

13. Warehouse receipts in Reclamation, petitioner's exhibits 43, 52 and 53 in evidence.

14. Statement of points on which appellants intend to rely on appeal.

15. This designation.

Appellants further state that a stipulation will be presented waiving the requirement that the foregoing exhibits be printed or failing in that a motion authorizing such procedure will be presented to the Court.

Dated: January 15, 1953.

/s/ FRANCIS P. WALSH,

/s/ HENRY GROSS,

/s/ JAMES M. CONNERS,

Attorneys for Appellant, Charles W. Ebnother,
Trustee in Bankruptcy.

/s/ FREDERICK M. FISK,

Attorney for Appellant, The Anglo California National Bank of San Francisco.

Of Counsel:

/s/ CHICKERING & GREGORY

Acknowledgment of Service attached.

[Endorsed]: Filed Jan. 15, 1953. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF RECORD
ON APPEAL

Comes now Schenley Industries, Inc., Petitioner in Reclamation in the court below, and Appellee in the above-entitled cause, and states that the parts of the record as docketed in the above court which are necessary to the consideration of this appeal, in addition to those parts previously designated by Appellants, are as follows:

1. The testimony of David F. Logan contained in the Reporter's Transcript on page 2097, line 12, to and including page 2103, line 26, and on page 2145, line 17, to and including page 2230, line 14; the narrative statement of this witnesses' testimony set out in Appellant's designation of record is not satisfactory to Appellee, and Appellee elects to require Appellants to substitute said witnesses' testimony contained in the above pages in question and answer form, pursuant to Rule 75(c) of the Federal Rules of Civil Procedure.

2. The entire testimony of Helen Husted contained in the Reporter's Transcript on page 1455, line 7, to and including page 1569, line 8; the narrative statement of this witnesses' testimony set out in Appellant's designation of record is not satisfactory to Appellee, and Appellee elects to require Appellants to substitute said witnesses' testimony

in question and answer form, pursuant to Rule 75(c) of the Federal Rules of Civil Procedure.

3. Testimony of Charles W. Ebnother, Trustee, contained in the Reporter's Transcript on pages 19, line 1, to and including page 23, line 22; page 394, line 24, to and including page 410, line 22; page 1178, line 3, to and including page 1264, line 10.

4. Testimony of Oliver I. Jacobsen, contained in the Reporter's Transcript on page 61, line 15, to and including page 116, line 13.

5. Testimony of Earl I. Johnson, contained in the Reporter's Transcript on pages 411, line 4, to and including page 448, line 4; page 563, line 22, to and including page 726, line 20; page 758, line 6, to and including page 800, line 22; page 803, line 22, to and including page 863, line 21; page 889, line 22, to and including page 909, line 2; page 1129, line 7, to and including page 1140, line 13.

6. Testimony of Robert H. Baglin, contained in the Reporter's Transcript on page 185, line 24, to and including page 198, line 23; page 208, line 10, to and including page 216, line 9.

7. Testimony of Walter Del Tredici, contained in the Reporter's Transcript on page 234, line 1, to and including page 271, line 9; page 274, line 6, to and including page 306, line 25.

8. Testimony of Elouise Jones, contained in the Reporter's Transcript on page 1140, line 15, to and including page 1144, line 5; page 1281, line 11, to and including page 1315, line 10.

9. Testimony of Eugene Branstetter, contained in the Reporter's Transcript on page 1339, line 6, to and including page 1349, line 4.

10. Testimony of Arthur E. Leithman, contained in the Reporter's Transcript on page 1574, line 21, to and including page 1610, line 7; page 1964, line 20, to and including page 1971, line 22.

11. The offer in evidence by the Trustee of Trustee's Exhibit No. 1, contained in the Reporter's Transcript on page 2484, line 6, to and including page 2487, line 17.

12. The objections of counsel for Appellee to the receipt into evidence of Respondent Bank's Exhibit No. 35, contained in the Reporter's Transcript on page 2230, line 15, to and including page 2231, line 23.

13. The objections of counsel for Appellee to the receipt into evidence of Respondent Bank's Exhibit No. 47, contained in the Reporter's Transcript on page 2483, line 5, to and including page 2484, line 5.

14. In addition to Appellant's designation of petitioner's exhibits in evidence Nos. 43, 52, and 53, the following exhibits in evidence of Appellee:

Petitioner's Nos. 1 through 5, inclusive, 14 through 21, inclusive, 22-A, 22-B, 40, 45, 46, 47, 50, 54, 59, 60, 61, 62, 65, 69, 88 and 89.

Also petitioner's Exhibit No. 34 for identification.

15. This designation.

Appellee will present a stipulation waiving the requirement that the foregoing exhibits be printed or failing in that a motion authorizing such procedure will be presented to the court.

Concurrently with this designation, Appellee has served and filed its motion to require Appellants to properly designate the testimony and evidence referred to above as necessary for the consideration of the appeal, or in the alternative to strike from the record paragraphs 5 and 31 of Appellants' Statement of Points on Appeal.

Dated: January 23, 1953.

BRONSON, BRONSON & McKINNON

/s/ By KIRKE LA SHELLE

/s/ By JOHN F. WARD

Attorneys for Appellee Schenley Industries, Inc.

Acknowledgment of Service attached.

[Endorsed]: Filed Jan. 23, 1953. Paul P. O'Brien, Clerk.

No. 13,600

IN THE

United States Court of Appeals
For the Ninth Circuit

THE ANGLO CALIFORNIA NATIONAL
BANK OF SAN FRANCISCO,

Appellant,

vs.

SCHENLEY INDUSTRIES, INC.,

Appellee.

CHARLES W. EBNOTHER, Trustee of the
Estate of Hedgeside Distillery Cor-
poration, Bankrupt,

Appellant,

vs.

SCHENLEY INDUSTRIES, INC., a corpora-
tion,

Appellee.

APPELLANTS' OPENING BRIEF.

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FILED

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111 Sutter Street, San Francisco 4, California.

Of Counsel.

JUL 29 1953

PAUL P. O'BRIEN

CLERK

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No. 13,600

IN THE

**United States Court of Appeals
For the Ninth Circuit**

THE ANGLO CALIFORNIA NATIONAL
BANK OF SAN FRANCISCO,

Appellant,

VS.

SCHENLEY INDUSTRIES, INC.,

Appellee.

CHARLES W. EBNOTHER, Trustee of the
Estate of Hedgeside Distillery Cor-
poration, Bankrupt,

Appellant,

VS.

SCHENLEY INDUSTRIES, INC., a corpora-
tion,

Appellee.

APPELLANTS' OPENING BRIEF.

I.

JURISDICTION.

This is an appeal pursuant to the provisions of Section 24 of the National Bankruptcy Act, 11 U.S.C., Ch. 4, §47; 11 U.S.C.A. §47, from an Opinion and Order of the United States District Court for the

Northern District of California, Northern Division, signed and filed August 18, 1952 (R. 78).

Said Opinion and Order is an affirmation on a review by the United States District Court, Honorable Dal M. Lemmon, District Judge, of an order of the Referee in Bankruptcy, dated January 10, 1952, granting the appellee, Schenley Industries, Inc., the right to reclaim or obtain immediate possession from the Trustee in Bankruptcy of certain barrels of grain spirits stored on the premises of the bankrupt, Hedge-side Distillery Corporation, at the time of bankruptcy. The appellee, in its reclamation petition (R. 3), named The Anglo California National Bank of San Francisco, a national banking association, a creditor, and Charles W. Ebnother, the Trustee in Bankruptcy, as respondents. Answers were filed to said reclamation petition by each of said respondents opposing said petition (R. 9 and 12), the matter was tried before the Referee in Bankruptcy, and a review of the said Referee's Order by said District Judge was obtained pursuant to the provisions of Section 39c of the National Bankruptcy Act, 11 U.S.C., Ch. 5, §67; 11 U.S.C.A. §67 (R. 43 and 78).

II.

STATEMENT OF THE CASE.

This appeal involves the construction of three California statutes, that is, (a) Section 3440 of the California Civil Code, (b) Section 3440.5 of the

same Code, and (c) the Uniform Warehouse Receipts Act as enacted in California (Deering's Gen. Laws, Vol. 3, Act 9059, §58). These statutes have to do with the conclusive presumption of fraud in the case of the transfer of personal property where the possession or control remain with the transferor, as such laws are more particularly construed in connection with a transfer of grain spirits produced and stored by a distiller in its own warehouse.

Schenley Industries, Inc. (hereinafter referred to as "Schenley"), the appellee, purchased the grain spirits, here the subject of litigation, from the bankrupt, Hedgeside Distillery orporation (hereinafter referred to as "Hedgeside"), but left said grain spirits in the bankrupt's possession in its internal revenue bonded warehouse located upon the premises of said distiller and owned, used and operated by it as a *convenience* to it in the production and distribution of grain spirits.

Schenley, upon receiving from the bankrupt, invoices covering the sale of said grain spirits paid for same and received as evidence of its ownership documents purporting on their face to be "warehouse receipts". A typical copy of such documents appears as Petitioner's Exhibits 43, 52, 53 introduced in evidence in this case. Copies of said documents were kept by the bankrupt at its principal place of business, an office building located on the distillery premises at Napa, a truck and a half distant from the warehouse buildings in which the grain spirits in

question were stored, but no copies were kept under the roof of or "at the warehouse" in which the grain spirits in question were stored.

The general creditors of the bankrupt, represented here by one of the appellants, have invoked the provisions of Section 3440 of the California Civil Code and urge that all transfers to Schenley of the above mentioned grain spirits were void as to them because of Schenley's failure to take physical possession of the goods. The applicable portions of said Section are as follows:

"§3440. [Transfers of particular personal property without delivery: Conclusive presumption of fraud: Transfers to which section not applicable: Transfers in bulk: Transfers under direction of court, etc.] Every transfer of personal property, other than a thing in action, or a ship or cargo at sea or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, *is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or encumbrances in good faith subsequent to the transfer; . . .*"
 (Italics ours.)

Schenley seeks to escape the application of the above law by the general creditors on two purported grounds. First, it contends that under the case law applicable in this jurisdiction grain spirits stored in a United States Internal Revenue Bonded Warehouse are not subject to Section 3440. Secondly, it contends that even if said Code section did apply the storage of grain spirits is excepted from said Code section by Subsection 3440.5 of the California Civil Code, which Subsection reads as follows:

“§3440.5. [Same: Limitation on application of rule: Goods for which warehouse receipt has issued: Necessity for retention of copy.] Section 3440 of this code shall not apply to goods in a warehouse where a warehouse receipt has been issued therefor by a warehouseman as defined in the Warehouse Receipts Act, and a copy of such receipt is kept at the principal place of business of the warehouseman and at the warehouse in which said goods are stored. Such a copy shall be open to inspection upon written order of the owner or lawful holder of such receipt.”

In order for the transactions with Schenley to fall within the provisions of the foregoing subsection it is necessary to show two things, which appellants contend the record below falls short of proving, i.e., first, that a warehouse receipt was issued for the goods sold “by a warehouseman as defined in the Warehouse Receipts Act”; and, secondly, that a copy of such warehouse receipt was kept not only at the

principal place of business of the warehouseman but "at the warehouse in which said goods are stored".

The California Warehouse Receipts Act (Deering's Gen. Laws, Vol. 3, Act 9059, §58) defines a warehouseman as follows:

" 'Warehouseman' means a person lawfully engaged in the business of storing goods for profit."

As we shall point out in our argument later, Hedge-side, the bankrupt, was not a warehouseman as defined by said Act, as it was not "lawfully engaged in the business of storing goods for profit". It charged merely a nominal monthly rental far below the rates charged by public warehousemen subject to regulation by the California Public Utilities Commission. The charges were in fact approximately one-half those made by regulated public warehouses (R. 884-886, Resp. Bank's Ex. 35). The evidence is uncontradicted that the monthly rental charges have remained the same notwithstanding expenses have risen precipitously and prices generally throughout the country have doubled and trebled. There is no evidence that at the time of establishing said charges, or at any other time, was there any *intent* on the part of the bankrupt to make a profit on the storage operation.

The issues, therefore, involve merely the construction of California statutes and may be summarized as follows:

1. Does Section 3440 of the California Civil Code apply to a transfer of grain spirits stored by the producer in bond in California?

2. Was Hedgeside a "warehouseman" as defined by the California Warehouse Receipts Act and, accordingly, within Section 3440.5 of the Civil Code?

3. Were copies of the receipts issued to Schenley by Hedgeside, in lieu of delivery and change of possession, kept "at the warehouse" as required by Section 3440.5?

There is no dispute as to the operative facts as the Court below found (R. 95). The issues to be resolved raise solely questions of law.

III.

SPECIFICATION OF ERRORS RELIED UPON.

We have heretofore filed with this Court under date of January 15, 1953, a "Statement of Points on Which Appellants Intend to Rely on Appeal". All of said errors flow from and are the result of the Court's basic errors, which we list as follows:

1. The Court erred in holding that the bankrupt, Hedgeside Distillery Corporation, was "engaged in the business of storing goods for profit" within the meaning of the California Warehouse Receipts Act.

2. The Court erred in holding that storage of alcoholic products in an Internal Revenue Bonded Warehouse was a sufficient change of possession to avoid the effect of Section 3440 of the California Civil Code.

3. The Court erred in holding that copies of Schenley's "warehouse receipts" were kept "at the ware-

house” within the meaning of Section 3440.5 of the California Civil Code.

4. The Court erred in holding that Schenley was entitled to the immediate possession of 4484 barrels of grain spirits produced by Hedgeside, sold by Hedgeside to Schenley, and in Hedgeside’s possession in its Internal Revenue Bonded Warehouse as of the date of bankruptcy.

5. The Court erred in not holding that Hedgeside was not a “warehouseman” as defined by the California Warehouse Receipts Act, that storage of alcoholic products in an Internal Revenue Bonded Warehouse is not a sufficient change of possession to satisfy Section 3440 of the California Civil Code, and that copies of Schenley’s receipts were not kept at the warehouse within the meaning of Section 3440.5 of the California Civil Code.

6. The Court erred in not holding that the transfer of said 4484 barrels of grain spirits from Hedgeside to Schenley was void as to the creditors of Hedgeside (represented by appellant, Charles W. Ebnother, Trustee in Bankruptcy) because there was not an immediate and continued change of possession from Hedgeside to Schenley as required by Section 3440 of the California Civil Code.

7. The Court erred in not holding that Schenley’s reclamation petition should be denied as to said 4484 barrels of grain spirits, and that the Trustee was entitled to said 4484 barrels for equitable distribution to the creditors of Hedgeside.

IV.

ARGUMENT.

A. HEDGESIDE WAS NOT AND DID NOT EVEN PURPORT TO BE A "WAREHOUSEMAN" AS DEFINED BY THE WAREHOUSE RECEIPTS ACT.

For the convenience of this Court, we point out that most of the Opinion and Order (R. 78-132) of the Honorable Dal M. Lemmon, being reviewed here, is irrelevant as the appellants have abandoned several of the issues raised in the hearing before the Referee and reviewed by District Judge Lemmon. For example, there is now no contest as to any of the production of the bankrupt's subsidiary (Franciscan Farm and Livestock Corporation, sometimes known as Mountain View) or of the production of *whiskey*, which requires aging, of either the bankrupt or its subsidiary, nor is there any review requested on whether or not the subsidiary was the *alter ego* of the bankrupt, nor of the question of whether or not the Appellant Bank obtained prior ownership rights to those of Schenley because of the issuance by the bankrupt of duplicate warehouse receipts. The issue to be reviewed has now been reduced to the single question of whether or not the transfers of "grain spirits" produced by the bankrupt and stored in its warehouse on the distillery premises were fraudulent and void as to creditors by reason of Section 3440 of the California Civil Code. The pertinent portions of the District Judge's Opinion and Order, therefore, now consist of his preliminary statements, sections numbered 1, 2, 3, 4, and 6 (R. 78-82,

94-95); "The Real Basic Issue," section numbered 13 (R. 115-124); the effects of storing in an Internal Revenue Bonded Warehouse, section numbered 14 (R. 124-130); and the last five paragraphs of "Conclusion," section numbered 15 (R. 131, 132).

It is undisputed that the barrels of grain spirits, which are the subject of this litigation, were produced by Hedgeside on its distillery premises at Napa, were stored in its warehouse operated as an internal revenue bonded warehouse located on its premises, were sold to Schenley for a valuable consideration, and were left in said warehouse continuously until and including the date of bankruptcy. Schenley received, at the time of purchase, written documents purporting on their face to be "warehouse receipts" (Pet. Ex. 43, 52 and 53) covering said grain spirits but failed to take physical possession thereof (Referee's Findings of Facts, Findings 3, 4; R. 17-25). Presumptively, since the transfer from Hedgeside to Schenley was "not accompanied by an immediate delivery followed by an actual and continued change of possession of the things transferred," said transfer "is conclusively presumed fraudulent and void as against the transferor's creditors while he remains in possession and the successors in interest of those creditors." California Civil Code, Sec. 3440.

To said Section 3440 the California Legislature has made an exception limiting its application:

"§3440.5. [Same: Limitation on application of rule: Goods for which warehouse receipt has

issued: Necessity for retention of copy.] Section 3440 of this code shall not apply to goods in a warehouse where a warehouse receipt has been issued therefor by a warehouseman as defined in the Warehouse Receipts Act, and a copy of such receipt is kept at the principal place of business of the warehouseman and at the warehouse in which said goods are stored. Such copy shall be open to inspection upon written order of the owner or lawful holder of such receipt.”

To fall within the foregoing exception one must among other things qualify as a warehouseman as defined in the California Warehouse Receipts Act (Deering’s Gen. Laws, Vol. 3, Act 9059, §58), which definition is as follows:

“‘Warehouseman’ means a person lawfully engaged in the business of storing goods for profit.”

From the foregoing statutes, it is apparent that in order for Schenley to have escaped the application of Section 3440 it must have proved (1) that copies of the receipts obtained were kept at Hedgeside’s principal place of business, (2) that copies were kept at the warehouse, (3) that Hedgeside was *lawfully* engaged in storing, and (4) that it was engaged in the *business* of storing goods *for profit*. Since possession of the grain spirits in question was with the Trustee in Bankruptcy at the time Schenley filed its petition for reclamation, the general burden of proof of showing the right to immediate possession fell upon Schenley (*In re Byrne*, 32 F.2d 189 (2d Cir. 1929); *In re Union Food Stores Co.*, 3 F.2d 736 (7th

Cir. 1925)) as possession in the Trustee gave rise to a presumption of ownership in the bankrupt. *In re Heintz-Merkle & Co.*, 1 F. Supp. 531, 536 (D.C. Penn. 1932), aff'd. 61 F.2d 519 (3d Cir. 1932); *Remington on Bankruptcy*, 4th Ed., Vol. 5, §2467. In addition, in order to escape the effects of Section 3440, Schenley was obligated to prove that it fell within Section 3440.5 above or that the four above requirements had been met. Section 3440.5 is an exception to and limits the scope of Section 3440. Therefore, according to the well-established principle of statutory construction, one asserting the exception must show strict compliance. *Canadian Pacific Ry. Co. v. United States*, 73 F.2d 831, 834 (9th Cir. 1934).

In apparent recognition of this burden, Schenley adduced evidence showing (1) that copies of the receipts obtained were kept at the bankrupt's principle place of business but it failed to produce satisfying evidence, (2) that copies were kept at the warehouse, and (3) that Hedgeside was lawfully engaged in storing, or any evidence (4) that it was engaged in the business of storing goods for profit.

Notwithstanding the failure or even attempt of Schenley to meet the burden of proof required to establish the exception, there is uncontradicted evidence in the record below that Hedgeside (1) did not advertise or solicit storage (R. 869; Referee's Findings of Fact, Finding 6, R. 29), (2) did not fix rates which could yield an excess of storage income over storage expense (R. 884-886, Resp. Bank's Ex. 35),

(3) did not attempt to fix rates which could yield such excess (R. 878), (4) refused to store for anyone who had not purchased its production or entered into a bottling contract with it (R. 873-874, 886-887), (5) did not file its storage rates with the California Public Utilities Commission (Resp. Bank's Ex. 47), and (6) established storage charges less than 50% of those charged by public warehouses throughout the state (R. 884-886; Resp. Bank's Ex. 35).

The undisputed facts below then are that Hedgeside never sought any warehouse business except where the goods stored were its own production or were to be serviced by it in some way, such as bottling. In fact, it refused to store unless the storage was incidental to its basic operation of distilling and bottling. It not only did not make a profit on its storing operation but it never made any effort to determine the results. The commercial Internal Revenue Bonded Warehouses in San Francisco and Stockton (not operated as part of a distillery), under the regulation of the California Public Utilities Commission, charged rates more than 100% higher than those charged by Hedgeside. This Court may take judicial notice (and the District Court and Referee below were in a similar position) of the fact that regulated public utilities are held to a return of less than 6%. Accordingly, if the rates charged by a regulated Stockton public warehouse are reasonable the rates of less than one-half charged by Hedgeside could not possibly represent a profit on its warehousing business. The rates

charged by Hedgeside were never changed from the inception of the company even though material and labor costs constantly rose generally throughout the country and particularly in California. Not only does the evidence show, without contradiction, that the warehousing business could not have been at a profit, but Mr. Logan's testimony, an officer and director of the bankrupt (R. 878), shows that there never was any *attempt* to make a profit. If you neither make a profit nor intend to make a profit you obviously cannot be in the business for profit.

In *Institute of Holy Angels v. Bender*, 79 N.J.L. 34, 74 Atl. 251 (N.J. 1909), the Court decided that a school is "not conducted for profit" within the meaning of the Tax Act involved when it appears that the charges for tuition and board are not fixed with the intention of yielding a profit over and above the actual cost.

In *Early v. Atkinson*, 175 F.2d 118, 122 (4th Cir. 1949), the Court held that the taxpayer's motive or state of mind determines whether a transaction was entered into for "profit" so as to make a loss incurred in the transaction deductible for income tax purposes.

Webster's New International Dictionary defines "profit" as "the excess of returns over expenditures in a given transaction or series of transactions;" also, "excess of income over expenditure, as in a business or any of its departments, during a given period of time."

According to the accepted rules of statutory interpretation, the words of the Legislature should be given their ordinary and usual meaning unless a different intent is shown. Also, statutes creating an exemption are strictly construed. Therefore, one would expect that the District Court would promptly have concluded from the clear and plain wording of the exemption and the undisputed facts that the bankrupt was not a warehouseman as defined by the California Warehouse Receipts Act, as it was not engaged in the business of storing goods for profit. However, not even Court decisions holding the word "profit" to mean an excess of receipts over expenditures (*Fairchild v. Gray*, 136 Misc. 704, 242 N.Y.S. 192) deterred the District Court from concluding that "profit" was synonymous with "charge" or "price".

The District Court in holding in his opinion that the bankrupt was engaged in the business of storing goods for profit (R. 117-122) did so by looking to the decisions of other jurisdictions and then referring to Section 57 of the Warehouse Receipts Act which indicates that the Act should be interpreted so as to produce uniformity with other states. In passing, we point out that California holds that its District Court of Appeal in construing the said Act should follow the court of last resort in this state rather than the decisions of some other state. *McMullins v. Lyon Fireproof Storage Co.*, 74 Cal.App. 87, 239 Pac. 422 (1925). Not only that but the courts of most states must have acted in a similar manner, otherwise there

would be no occasion for Vol. 3 of Uniform Laws Annotated covering warehouse receipts, consisting of some 273 pages and a multitude of decisions of the various states which have adopted the Uniform Warehouse Receipts Act in which they differ from one another in their respective interpretations of the various provisions of said Act.

One of the decisions the District Court relied on in this connection is the case of *Fidelity & Deposit Co. v. State of Montana*, 92 F.2d 693 at 696 (9th Cir. 1937). This case is not in point as there was no contested issue as to whether or not Chatterton & Son was a public warehouseman as defined by the Warehouse Receipts Act, as that fact was not questioned. In this connection, the Ninth Circuit Court noted, at page 696:

“The application was for a public warehouseman’s bond. *That Chatterton & Son was a public warehouseman within the general meaning of the term is not questioned.* A storage and handling charge was regularly exacted from all those using the warehouse facilities and negotiable warehouse receipts were uniformly issued. 67 C.J. 443.” (Italics ours.)

The only comment by the District Court on the case at bar was a reference to the last two sentences of the above quotation. (R. 120.)

Not only did the decision not involve an interpretation of the definition of a warehouseman in the Uniform Warehouse Receipts Act but the Court actually

referred to 67 C.J. 443 which defines a public warehouse as follows:

“A ‘public warehouse’ is a place that is held out to the public as being one where any member of the public, who is willing to pay the regular charges, may store his goods and then sell or pledge them by transferring the receipt given him by the keeper or manager.”

The undisputed evidence below (R. 29 and 869) is that Hedgeside did not hold itself out to store for the public generally, nor did it solicit storage. Therefore, for an additional reason the above decision is in no sense a precedent in this case.

The District Court next cited (R. 121) the case of *New Jersey Title Guaranty & Trust Co. v. Rector*, 76 N.J. Eq. 587, 75 Atl. 931 (1910). This decision reversed the trial court’s order sustaining a demurrer to a complaint in interpleader which had failed to set forth the *amount* of storage charges exacted. The New Jersey Court referred to Section 58 of the Warehouse Receipts Act treating with the definition of warehouseman and then said that the bill of complaint “alleges that the complainant is conducting the business of running safe deposit vaults and warehousing valuable goods and chattels for hire, which sufficiently describes ‘warehouseman’ as defined by the Act,”. Here a pleading question only was involved and the complainant had alleged that it was “in the business” of running safe deposit vaults and warehousing goods. “Business,” in the commonly accepted meaning of

the word, means an occupation engaged in for profit. 5 *Words and Phrases* at pp. 998-1005. Again, the case is not in point as the question of profit or no profit was not placed in issue.

The case of *New Jersey Mfg. Ass'n. Fire Insurance Company v. Galowitz*, 150 Atl. 408 (N.J. 1930), relied on by the District Court (R. 122) is likewise not in point. In this case the defendant, a garage-keeper for hire, was sued in connection with the destruction by fire of certain automobiles stored in his garage. There was no contested issue as to whether the defendant was engaged in the garage business *for profit*. Therefore, the question involved was not litigated. Any garageman storing cars for hire would be presumed to be in the business for profit unless surrounding circumstances pointed otherwise. In the case at bar the uncontradicted proof is that the bankrupt neither made nor intended to make a profit out of his warehousing business.

In like manner, the case of *E. V. Webb & Co. v. Friedberg*, 189 N.C. 166, 126 S.E. 508 (1925), cited by the Court (R. 122) is not in point. In this case the North Carolina Court, after making the statement at p. 509 quoted by Judge Lemmon (R. 122), made the following statement:

“The receipts *and admitted evidence* shows that the concerns are warehousemen and the concerns dealt with the public as such.” (Italics ours.)

In the case at bar the receipts given and the undisputed evidence prove that Hedgeside did not deal

with the public generally and was not in the business for profit.

Not only did the District Court erroneously construe Section 3440.5 to mean that one may be a warehouseman as defined by the California Warehouse Receipts Act if a charge for storage is made regardless of whether one is engaged in the business for profit, as such term is commonly understood, and justify its conclusion upon decisions of jurisdictions other than California (which, as we have just pointed out, did not involve the issue of the profit), but said District Court discarded two California cases on the grounds that they were not in point (R. 120) by stating that "for profit" was used interchangeably in said cases with "to pay for that service" and "charge for storage." We submit that this is a wholly erroneous interpretation of said decisions.

The first case so treated is *Sinsheimer v. Whitely*, 111 Cal. 378, 43 Pac. 1109 (1896) (R. 119). In that case there was a controversy as to whether a particular document was a warehouse receipt or merely a weighing tag. The alleged warehouseman had made no charge for storage. The District Court below quoted a portion of said opinion as follows:

"A warehouse receipt has been defined to be a written contract between the owner of the goods and the warehouseman, the latter to store the goods and the former to pay for that service. (*Hale v. Milwaukee Dock Co.*, 29 Wis. 488; 9 Am. Rep. 603.) Perhaps some of the terms of this contract may be implied (see forms of such re-

ceipts construed in *Lowrie v. Salz*, 75 Cal. 349, and *Bishop v. Fulkert*, 68 Cal. 607); but surely there ought to be something on the face of the instrument to indicate that a contract of storage has been entered into; our statute on the subject requires that much (Stats. 1877-78, p. 949, sec. 5); the language in the papers here, 'Weighed for F. J. Silva forty sacks beans,' no more signifies that the paving company received or held the beans as a warehouseman than that it bought or sold the same, or shipped them to a distant port; on their face they plainly are not warehouse receipts. (*Cathcart v. Snow*, 64 Iowa 584; *Robson v. Swart*, 14 Minn. 371; 100 Am. Dec. 238.) But it is said that the tickets were the only vouchers issued by the defendant company, and hence must be treated as warehouse receipts. Rather, it seems to us, that circumstance tends to show that said company was not a warehouseman at all in the sense which the law attributes to that term—an inference corroborated by the fact that it makes no charge for storage. *It is only persons who pursue the calling of warehousemen—that is, receive and store goods in a warehouse as a business for profit—that have power to issue a technical warehouse receipt, the transfer of which is a good delivery of the goods represented by it.* (*Shepardson v. Cary*, 29 Wis. 42; *Bucher v. Commonwealth*, 103 Pa. St. 534; Edwards on Bailments, sec. 332.)" (Italics ours.)

From the portions of the opinion quoted above, the District Court below erroneously concluded (R. 120) that the expressions "to pay for that service," "charge for storage," and "for profit" are used inter-

changeably. It is difficult to determine why this erroneous interpretation of the opinion occurred. The Court in the above decision did hold that the person in question was not storing for profit if he charged nothing, but he certainly did not hold, say, or intimate that one becomes a warehouseman by merely charging something, however nominal the amount. Of course, profit does not exist if no storage charge whatsoever is made, as the California Supreme Court held, but, from the foregoing we submit that the implication is that a charge which is profitable or intended to be profitable should be made to qualify as a warehouseman under the Act and not merely that some insignificant and unprofitable charge be made as the District Court below held.

The above discussion applies equally to the other California case cited (R. 120) by the District Court, *Harry Hall & Co. v. Consolidated Packing Co.*, 55 C.A.2d 651, 131 P.2d 859 (1942). This case involved a raisin packer who sold raisins to a buyer. The packer issued what purported to be a warehouse receipt for the goods which the buyer in turn assigned to the plaintiff. On the refusal of the packer to deliver, suit resulted. The goods were at all times stored on the packer's premises and no storage charges were made. Noting that the packer received no storage charges, the Court held that the document in question could not be a warehouse receipt, citing *Sinsheimer v. Whitely, supra*. There is no intimation in the opinion that the court, contrary to the language of the Ware-

house Receipts Act, would have held the packer to be a warehouseman if a nominal storage rate too low to produce a profit had been charged.

While we do not contend that the above California cases expressly hold that a profitable storage charge must be made to qualify as a warehouseman under the California Warehouse Receipts Act, we do contend that the plain wording of the Act requires such a construction and if any implication is to be drawn from the above cases it is that the purported warehouseman must have at least *intended* to make a profit.

The District Court concedes that the California decisions hold that one does not qualify as "warehouseman" in California where no charge is actually made but appears to hold that *any* charge however small meets the requirements of the Act. If so, Section 3440 has been completely abandoned as any manufacturer or producer may build a building to house its production, sell and store same, issue a receipt for a nominal charge, and thereby deprive creditors of the benefits of Section 3440.

We respectfully submit that that should not be and is not the law. We know of no decision in California or elsewhere that has reached that conclusion.

B. GOODS STORED IN AN INTERNAL REVENUE BONDED WAREHOUSE ARE NOT EXEMPTED FROM THE APPLICATION OF THE CALIFORNIA STATUTE, SECTION 3440.

§3440 of the California Civil Code provided at the time of bankruptcy of Hedgeside that every transfer of personal property made by a person having possession or control of the property is conclusively presumed fraudulent unless accompanied by an immediate delivery and followed by an actual and continued change of possession, subject to certain exceptions. Among the exceptions are choses in action and a ship or cargo at sea or in a foreign port. Another exception applies to transfers of wines and the pipes and casks in which the wine is contained, provided the transfer is recorded. There is and was then no exception applicable to distillers generally or to transfers of whiskey or grain spirits. In *Stewart v. Scannell*, 8 Cal. 81 (1857), a case which has never been overruled, the California Supreme Court invoked the statute which was a predecessor to §3440 to defeat a sale of whiskey, the whiskey being retained by the vendor in its warehouse and warehouse receipts being issued therefor to the purchaser.

Notwithstanding the foregoing case, the District Court below held that storage by a distiller in an internal revenue bonded warehouse, owned and operated by the distiller, was sufficient to avoid the application of §3440 whether or not warehouse receipts for the spirits or whiskey were issued by a "warehouseman" as defined by the California Warehouse Receipts Act (R. 124). In short, according to

the position of the District Court below, it is unnecessary to determine whether or not Hedgeside was a warehouseman, since storage by it of its grain spirits production in its internal revenue bonded warehouse avoids §3440 in any event.

No statutory language was invoked to support this result, and our position is that under the plain terms of §3440 its provisions apply notwithstanding storage is in bond. If further support were needed, the fact that the legislature adopted some exceptions but none for transfers of whiskey or grain spirits shows that no exception as to the latter categories of goods was intended, whether or not storage is in bond, under the familiar maxim *expressio unius est exclusio alterius*, a principle particularly applicable to the construction and interpretation of statutes. *Miller v. Commonwealth*, 180 Va. 36, 21 S.E.2d 721 (1942).

Our contention that the legislature never intended an exception to apply to storage of whiskey or grain spirits in bond is further fortified by the subsequent history of §3440. In 1951 the California legislature amended the section to provide a further exception with respect to brandy. Stats. 1951, Ch. 1687, §2. The exception applicable to brandy now provides:

“This section (§3440) shall not apply to any of the following:

(d) Wines or brandies in the wineries, distilleries, or wine cellars of the makers or owners of the wines or brandies, or other persons having possession, care, and control of the wines or brandies, and the pipes, casks, and tanks in which

the wines or brandies are contained, if the transfers are made in writing and certified and verified in the same form as provided for chattel mortgages, and if the transfers are recorded in the book of official records in the office of the county recorder of the county in which the wines, brandies, pipes, casks, and tanks are situated.”

Certainly there was no reason to adopt an exception with respect to brandy if storage in an Internal Revenue Bonded Warehouse automatically creates an exception, as the reasons for storage of brandy in bonded warehouses are fully as compelling as those for storing whiskey and grain spirits, since the rate of tax is the same (26 U.S.C.A. §2800(a)(1)),¹ and all distilled spirits, including brandy, must be deposited in a bonded warehouse to escape immediate imposition of the tax. 26 U.S.C.A. §2800(b)(1) and (2); 26 U.S.C.A. §2879.

The conclusion of the District Court below was based on an analysis of cases from other jurisdictions applying dissimilar statutes as applied to dissimilar facts. The Court’s opinion was based primarily on *Taney v. Penn Bank*, 232 U.S. 174, 34 S. Ct. 288, 58 L. Ed. 558 (1914) (R. 125). That case is an early case excusing a change of possession in the case of distilleries operating in Pennsylvania. However, the

¹Grape brandy is included within the definition of “distilled spirits” in §2800(a)(1), 26 C.F.R. Part. 183.1(g), which defines distilled spirits as follows: “Distilled spirits” shall mean that substance produced by the distillation of fermented grain, molasses, or other materials, commonly known as spirits, whiskey, rum, gin, brandy, etc., but shall not include alcohol.

case purported to apply Pennsylvania law, and not some federal law as the District Court below erroneously implied (R. 129). In this connection, the U. S. Supreme Court in the *Taney* case held (232 U.S. at 180):

“The legal effect of the transaction depends upon the local law.”

Since the District Court below heavily relied on the last-cited case and the opinion below in the same case (*Taney v. Penn Bank*, 187 Fed. 689 (3d Cir. 1911)), we will analyze the case in some detail in the light of the contrasting California law which must control the result here.

The *Taney* case involved a pledge of whiskey. There was no transfer of physical possession, but the pledgor issued warehouse receipts to the pledgee, the whiskey being stored in an internal revenue bonded warehouse. The Supreme Court held that *under the law of Pennsylvania* the pledgee prevailed over the trustee in bankruptcy of the pledgor despite said pledgee's failure to take physical possession.

The Supreme Court noted that by *Pennsylvania law* a transfer of possession is not required when the usages of the particular trade or business are such that those engaged in the business do not regard a physical delivery as customary or essential, or where the inherent nature of the transaction and the attendant circumstances are such as to preclude the possibility of a delivery by the vendor. 232 U.S. at 181.

As to usage, suffice it to say that the California statute makes no such exception, no California case has been cited as even *intimating* that such an exception exists, and the appellants' contention in *Stewart v. Scannell, supra*, that commercial convenience and expediency would best be served by recognizing constructive changes of possession in certain instances was rejected by the California Court. In the *Scannell* case, the vendor sold certain barrels of whiskey but retained possession as a warehouseman, issuing warehouse receipts to the vendee. A storage charge was made. The California Court held, nevertheless, that the transaction was void under the California statute as to creditors of the vendor.

An additional point considered relevant by the U. S. Supreme Court under *Pennsylvania law* was the "joint custody" of the whiskey by the warehouse proprietor and the government storekeeper-gauger. Under the Internal Revenue laws, the government employee can and does refuse to permit physical removal of whiskey or spirits from the proprietor's warehouse until taxes due are paid. However, his responsibility ends when such taxes are paid and even during storage he is unconcerned with questions of ownership, storage charges and the like. This joint control or custody was considered of some significance in excusing changed possession under *Pennsylvania law*, but is of no importance whatsoever under *California law*. Two *California* cases control on this point. In each of said cases it was easier to contend that there was "divided possession" or "joint

custody" than it is in the case of Hedgeside and a storekeeper-gauger; notwithstanding, Section 3440 was held to apply.

The first case is *Newell v. Desmond*, 63 Cal. 242, 15 Pac. 369 (1883). In that case two partners were in joint possession of certain goods belonging to the partnership. One partner purported to sell his interest in the goods to a third person without any transfer of possession. The Court held the transfer was void as to creditors of the transferor despite the transferor's divided possession with his partner.

The second case is *Haster v. Blair*, 41 C.A.2d 896, 107 P.2d 933 (1940). In that case personal property was in the divided possession of two tenants in common. One tenant attempted to transfer his interest to a third person without a transfer of possession. The Court held the transfer void as to creditors despite the shared possession of the transferor. It will be seen from the above two cases that any "joint custody" between Hedgeside and a government storekeeper-gauger is entirely irrelevant in applying Section 3440 to the attempted transfer from Hedgeside to Schenley.

However, still another factor was considered by the U. S. Supreme Court as significant under Pennsylvania law in upholding the transfer in question. The Court held that there were certain difficulties in the inherent nature of the transaction and attendant circumstances so that by Pennsylvania law delivery was excused. Here the Court referred to a finding that

before delivery could be made a tax had to be paid, and that the goods were not ready for delivery at the time of pledge since they had to be put in a bonded warehouse to complete the necessary aging process. 232 U.S. at 185.

The California legislature may well have had the same problem in mind when it adopted the present statutory exception to the application of §3440 in the case of brandy.² But the remedy in case of hardship is to seek revision of the statute, as, of course, has been done with respect to some products. Absent an exception spelled out by statute, §3440 has been rigorously applied despite the presence of factors relied on by the Supreme Court as excusing a change under the law of Pennsylvania.

It is true that in California in the case of bulky articles or growing crops, when immediate delivery is well nigh impossible, a *delay* in transferring possession is excused. See, e.g., *Dubois v. Spinks*, 114 Cal. 289, 46 Pac. 95 (1896); *Westcott v. Nixon*, 132 Cal.App. 490, 23 P.2d 75 (1933). But this principle does not apply to spirits or whiskey, whether in barrels or bottles. *Guthrie v. Carney*, 19 Cal.App. 144, 152, 124 Pac. 1045 (1912) (*held*, wines and liquors in barrels, demijohns and bottles not a bulky article so as to excuse delivery). Furthermore, no California case intimates that the avoidance of tax payments or other expense or the necessity for aging excuses

²No doubt distillers of whiskey and grain spirits would have sought a similar exemption had their business been of as much importance in California as are the grape and brandy industries.

immediate delivery as was indicated in dicta in the *Taney* case. Even if California law were identical, which it is not, the *Taney* case would have no application. In the first place, the merchandise now in dispute consists of grain spirits which do not require aging. Furthermore, other warehouses were so close to Hedgeside that whiskey and spirits could be stored elsewhere within 72 hours so that tax payments could be avoided. This was not true on the facts of the *Taney* case, and the evidence in the present case showed that some whiskey or spirits produced at Hedgeside actually *was* stored at other warehouses within the 72 hour period (R. 887-891).

Finally, assuming for argument's sake that some delay on the present facts would be permitted under California law (which is not the case) the delay in the case at bar has continued far too long a time. This principle is well illustrated in the rule applicable to growing crops. In that situation, although an *initial* delay is permitted, once the crops have matured immediate delivery must be made. *Westcott v. Nixon*, 132 Cal.App. 490, 23 P.2d 75 (1933). On the facts of the present case, although some initial delay may have been desirable from Schenley's standpoint, it actually did take delivery of some whiskey and spirits from Hedgeside purchased under the same production contracts as the merchandise now in dispute. Since it was feasible to make partial withdrawals, it was equally feasible to withdraw the whole. Certainly Schenley cannot be heard to say that delivery should be excused simply because it did not happen to suit

its convenience to take delivery of *all* of the spirits now in dispute.

Finally, according to the clear language of the California statute (Section 3440) there is no requirement that creditors be in fact misled by the seller's possession in order to invoke said statute. The *Taney* case discussion of this point is completely irrelevant under California law. *Joseph Herspring Co. v. Jones*, 55 Cal.App. 620, 203 Pac. 1038 (1921).

The second case cited by the Court below (R. 129) as purportedly supporting its position that §3440 does not apply as to goods stored in an internal revenue bonded warehouse is *Merchants Nat. Bank v. Roxbury Distilling Co.*, 196 Fed. 76 (D.C. Md. 1912). The Court in that case points out that a change of possession is excused in Maryland in the case of distillers because of a special Act expressly making distillers "warehousemen" under the Maryland Warehouse Receipts Act. The Court added that the same result would be reached independently of said statute, but in so doing it cites the *Taney* case, which, as above noted, depends on decisions treating a retention of possession as merely a badge of fraud which can be overcome by showing hardship, etc. This rule, of course, does not apply under the law of California which must control the result here, since by California law a retention of possession is *conclusively* presumed fraudulent.

It is respectfully submitted that based on the plain language of §3440 of the California Civil Code, a deposit of grain spirits in an internal revenue bonded

warehouse does not avoid the effect of the statute, and the District Court's holding to the contrary must be overruled.

The District Court below threw out Section 3440 because of the "Government's tight control over distilleries" (R. 124) and the "Government's heavy hand" as displayed in the *Taney* case (R. 125). He emphasized "joint custody" between the storekeeper-gauger and the proprietor (R. 126) and that the *Taney* case related to Federal statute and not Pennsylvania law (R. 129). The last statement is a clear misconstruction of the import of that case as we have already pointed out. It makes clear, however, the fact that the District Court below failed to recognize his obligation to determine the expressed intent of the California legislature as derived from the words used in the light of the California law when such words were used. The *Taney* case involved a Pennsylvania statute quite different from our California statute which has been construed by our Courts and amended by our legislature in a manner inconsistent with the *Taney* case decision. It, therefore, is no precedent to be followed in this case. The government storekeeper-gauger was under no obligation to control or keep track of ownership. He was only concerned with physical possession and the payment of tax. There are many internal revenue bonded warehouses in California qualified as public warehouses in no way connected with a distillery. In fact, we know of no whiskey distilleries in California since the demise of Hedgeside. What better proof is there that

the storekeeper-gauger has no knowledge or interest in ownership than the fact that over a period of years the bankrupt borrowed several hundred thousand dollars secured by purported warehouse receipts on spirits that had already been sold. The Government's tight control over distilleries may well protect its tax but it certainly offers no protection to creditors. A bonded warehouse under the lock and key of the government may even offer an impedance to a creditor determining whether his receipt is worthless as security.

C. NO COPIES OF HEDGESIDE'S WAREHOUSE RECEIPTS WERE KEPT AT ITS WAREHOUSE AS REQUIRED BY SECTION 3440.5 OF THE CALIFORNIA CIVIL CODE.

As earlier stated, in addition to being a "warehouseman" as defined by the California Warehouse Receipts Act, copies of the warehouse receipts must be kept "at the warehouse" for Section 3440 of the California Civil Code to be avoided by showing compliance with the exception contained in Section 3440.5 of said Code.

Schenley failed to come within the provisions of Section 3440.5 due to the fact that Hedgeside could not qualify as a "warehouseman" within the meaning of the Warehouse Receipts Act. That failure alone calls for reversal.

Nevertheless, Schenley's claim should be defeated, and the Court's order below reversed even if it had proved that Hedgeside was a "warehouseman", which

it did not, since it failed to prove that copies were kept "at the warehouse."

The proof shows (R. 711) that all copies were kept in a safe in an office building located a truck and a half away from the warehouse building (R. 718). No attempt was made by either Hedgeside or Schenley to comply with the provisions of Section 3440.5 which requires that copies be kept "at the warehouse" as well as at the principal place of business.

Since Section 3440.5 must be literally and strictly construed, *Canadian Pacific Ry. Co. v. United States, supra*, it is submitted that as an independent grounds of reversal of the order below this Court should hold that copies of Hedgeside's receipts were not kept "at the warehouse" as required by said Section 3440.5. The District Court's construction was just the reverse and therefore in error (R. 122-124).

D. HEFFRON v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N., 113 F.2d 239 (9th Cir. 1940), HAS NO APPLICATION IN THE CASE AT BAR.

The District Court below, relying on the *Heffron* case above, held that Section 3440 no longer governs a case of the type this case presents (R. 115-117). That decision is no precedent in this case as it clearly involved a warehouseman engaged in the business of storing goods for profit. It dealt with the familiar operation of a "field warehouse" operated by the well-established business enterprise, the "Lawrence Ware-

house Company," a strictly warehouse business operated for a profit over a period of many years.

V.

CONCLUSION.

The gist of this case involves merely the proper construction and application of three statutes, viz., Sections 3440 and 3440.5 of the California Civil Code and the definition of "warehouseman" in the California Warehouse Receipts Act. There is nothing mysterious or ambiguous about the language of said three statutes. Their meaning is perfectly plain, and their application defeats Schenley.

In apparent recognition of the weakness of its position under the *statutes*, Schenley elected to rely on case authority from other jurisdictions having nothing whatsoever to do with Section 3440 or its effect, and distinguishable both on the facts and the law. Apparently the District Court was convinced and erroneously adopted Schenley's theory.

If Hedgeside may become a "warehouseman" merely by calling itself one, issuing documents purporting to be warehouse receipts and charging a nominal storage charge, then every other manufacturer in the state may do the same. If Hedgeside may avoid Section 3440 merely because it suits the convenience of itself or its customers to leave sold goods on its premises, we have no doubt that other manufac-

turers will find equally valid arguments of convenience or expediency. Such a result means the end of Section 3440, requires a refusal to apply the plain language of the statute, and would produce not only an unlawful result here, but would create endless opportunities for future secret liens, frauds on creditors, and complications in the administration of bankrupts' estates.

We urge that the order of the Court below be reversed as to the barrels of spirits now in dispute and that Schenley's Reclamation Petition be dismissed.

Dated, San Francisco, California,

July 24, 1953.

Respectfully submitted,

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No. 13,600

IN THE

United States Court of Appeals
For the Ninth Circuit

THE ANGLO CALIFORNIA NATIONAL BANK
OF SAN FRANCISCO,

Appellant,

vs.

SCHENLEY INDUSTRIES, INC.,

Appellee.

CHARLES W. EBNOTHER, Trustee of the
Estate of Hedgeside Distillery Corpo-
ration, Bankrupt,

Appellant,

vs.

SCHENLEY INDUSTRIES, INC., a corpora-
tion,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

PRELIMINARY STATEMENT.

Four years ago appellee Schenley Industries, Inc. (hereinafter called "Schenley"), filed a petition in reclamation in the District Court, seeking possession of its goods from a bankrupt warehouseman.

Schenley had bought and paid for the whiskey and spirits. They were stored in an Internal Revenue Bonded Warehouse licensed by the United States, and licensed by the State of California. Schenley paid the regular storage charges and held warehouse receipts for the goods. The warehouse receipts were duly issued and regular on their face. Schenley asked for its goods.

Some two years later, after testimony reported in 2,523 pages of transcript and after thousands of documents had been introduced into evidence, the case was finally submitted to the Referee in Bankruptcy. Some 9,000 barrels of whiskey and spirits were involved, and against them the appellant Anglo Bank and appellant Trustee in Bankruptcy made adverse claims which ran the gamut of legal theory. But diverse as the claims were, all had two things in common. They were technical to the point of hair-splitting. And they were *contrary to the facts*.

The Referee made an order granting the petition in reclamation, and made detailed Findings of Fact and Conclusions of Law. The United States District Court approved and adopted the Findings of Fact of the Referee, reviewed the applicable law, and promptly affirmed the Referee's order. In a superbly written and documented opinion, Hon. Dal M. Lemmon has disposed of the same contentions urged by appellants here.¹

¹Appellants in listing the "pertinent portions" of the opinion seem to have omitted Section 5, Record pp. 82-94. It is decidedly "pertinent", although adverse to appellants.

Only part of the conflict in the lower Courts has been brought here on appeal.

The Bank has abandoned its original claim of ownership and now appears only as a creditor. The Trustee has abandoned all claim to half of the goods, so that some 4,484 barrels of spirits remain contested.

The Trustee has been unable to show any factual defect in Schenley's title, and has neither pleaded nor proved any actual fraud on creditors which would invalidate Schenley's purchases. The Trustee does urge the sole legal defense that the sales to Schenley were constructively fraudulent because of an asserted lack of change of possession. Simply stated, the contention poses but two main questions:

(1) Was Hedgeside a qualified and licensed warehouse authorized to issue warehouse receipts?

(2) When whiskey or spirits are sold, are the requirements of a change of possession met by a transfer into an Internal Revenue Bonded Warehouse?

The second is purely a legal question. It is undisputed that the goods here were transferred into a qualified and licensed Internal Revenue Bonded Warehouse. Judge Lemmon's opinion fully reviews the applicable law on this point. We can add little to that discussion except for a brief rebuttal to the Trustee's attempt to wriggle out of its coverage.

The first question is *not* purely legal. It is also factual. It has now been answered by two different

Courts, which made and adopted detailed findings of fact from the mountains of evidence. *But the facts found by the Courts below are not the "facts" recited by appellants to this Court.*

Appellants do *not* in their brief directly challenge the sufficiency of the evidence to support the Findings of Fact. Instead appellants simply ignore the Findings, state that "there is no dispute as to the operative facts,"² and blandly proceed to state the evidence most favorable to *appellants*.

We understand the rule to be that Findings of Fact of the District Court are presumptively correct and are not to be set aside unless clearly erroneous (*Goldstein v. Polakof*, CCA-9, 1943, 135 F.(2d) 45; *United States v. Foster*, CCA-9, 1941, 123 F.(2d) 32). The Findings here are not "clearly erroneous", nor erroneous at all. They are supported by the weight of the evidence. The Findings are also fatal to appellants' contentions.

Since appellants have not chosen to state the evidence fully and fairly, we will first state the facts as found by the Referee and by the District Court. We will then reply to the appellants' arguments in the order made.

²App. Brief, p. 7.

II.

STATEMENT OF FACTS.

The 4,484 barrels of spirits in dispute were purchased by Schenley from Hedgeside Distillery in two different lots under separate contracts. The first 1,293 barrels were purchased under a production contract dated September 17, 1945, and the balance of 3,191 barrels under a production contract dated October 13, 1947.³ For all purposes here, the contracts and performance under them were identical.

The contracts required Schenley to purchase and Hedgeside to sell a large share of Hedgeside's production of spirits. The contracts provided that Schenley would furnish the cooperage, would inspect and accept the spirits as produced, and would take title on delivery of warehouse receipts.

The contracts further provided "at our request you agree to store distilled spirits produced by you for us hereunder in your Internal Revenue Bonded Warehouse at Napa, California, to the extent of Ten Thousand (10,000) barrels, the total storage charge therefor to be Ten (10¢) cents per barrel per month, plus customary handling charges of Twenty-five (25¢) cents per barrel in and Twenty-five (25¢) cents out, we to furnish our own insurance * * *"⁴

Under these contract provisions a representative of Schenley was stationed at Hedgeside Distillery. He

³Pet.'s Exhibits Nos. 15 and 22-B; Findings, R. 83.

⁴Pet.'s Exhibit No. 15, par. 7; the 1947 contract contained a similar provision, Pet.'s Exhibit No. 22-B, par. 10.

inspected and accepted spirits produced under the contracts. After his acceptance, the representative approved a Hedgeside invoice to be sent to Schenley for payment.⁵

Hedgeside thereupon billed Schenley and delivered warehouse receipts for the goods, placing the goods themselves in the Internal Revenue Bonded Warehouse on the premises. Schenley paid Hedgeside in full for all spirits so delivered under the contracts.⁶ As appears from the testimony of Elouise Jones and Earl Johnson, Schenley was put to its proof on every barrel and every document. But when the long and involved testimony was over and the thousands of documents were in evidence, Schenley had proved that it purchased and paid for every barrel of spirits.⁷

Petitioner's Exhibits Numbers 52 and 53 are typical warehouse receipts and evidence of payment on these transactions.

It should be emphasized that *there is no evidence whatever of any factual defect in Schenley's title to the goods it purchased*, and the District Court so found.

All warehouse receipts held by Schenley were issued by Hedgeside as the proprietor of its Internal

⁵Walter Del Tredici, R. pp. 197-264; *Findings*, R. p. 83.

⁶*Findings*, R. 82-83; *Earl Johnson*, R. pp. 311-480, 481-580; *Elouise Jones*, R. 581-854; 667-695.

⁷Many of the payments cleared through the very bank which appears here as an appellant, the bank holding the warehouse receipts for delivery to Schenley when payment was received at the bank (testimony of Elouise Jones).

Revenue Bonded Warehouse No. 2, located on the Hedgeside premises at Napa.

Hedgeside operated a distillery engaged in the manufacture of whiskey and spirits. Such goods by Federal law *must* be stored in bond within 72 hours of manufacture or the heavy tax levied by the United States, several times the value of the goods themselves, falls due at once.⁸ Most distillers then also operate an Internal Revenue Bonded Warehouse where the goods can be stored for several years without payment of tax.⁹

It is undisputed that Hedgeside had both Federal and State licenses for its I.R.B.W. Treasury Department Form 27-D, when approved by the Alcohol Tax Unit of the Bureau of Internal Revenue, authorized Hedgeside to store spirits in bond in the warehouse without payment of tax.¹⁰ The form itself contains a detailed description of the warehouse, which is inspected before approval of the permit.

Hedgeside also held a "Distilled Spirits Manufacturers" license and a "Public Warehouse" license from the State of California under the provisions of its Alcohol Beverage Control Act.¹¹ These licenses *specifically authorized* Hedgeside *to store* whiskey and spirits for other persons licensed to hold alcoholic

⁸26 USCA Sec. 2800-B-2.

⁹As counsel for the Trustee put it, "Now, you know as a matter of fact, do you not, Mr. Johnson, *that every distillery is required to have a bonded warehouse on its premises?*" (p. 491, lines 21-23, orig. Rep. Tr.)

¹⁰Pet.'s Exhibit No. 47.

¹¹Pet.'s Exhibits Nos. 60, 61, 62.

beverages in bulk, and to issue *warehouse receipts* for them. (Secs. 6 (L), 6 (M), 6 (K), *Deering's California General Laws*, Act 3796.)

Over a period of years Hedgeside stored goods for various persons and firms licensed to deal in bulk whiskey and spirits, although, of course, it could not and did not store for the general public.¹² A charge was made for storage and handling of the goods.

The storage charge to Schenley, as provided in its production contract for large-scale storage, was 10¢ per barrel per month.¹³ The warehouse receipt books show that a similar charge was made to Barnhill Distilleries, which also purchased large quantities for storage. In other cases, including storage of Schenley's goods which were not purchased under production contract, the storage charge was 20¢ per barrel.¹⁴ The in-and-out handling charge in all cases was 25¢ per barrel.

¹²As a review of its warehouse receipt books indicates, Pet.'s Exhibits Nos. 1, 2, 3, 4, 5, 59, these storage customers included Wm. Lewis & Co., Larkmead Vineyards, Bank of America, E. Martinoni Co., Joseph Abrams Co., Silverado Grape Growers Coop., Irving M. Jacobs, Mohawk Liquor Co., Beaulieu Vineyards, Glaser Bros., Napa Valley Winery, National Liquor Stores, Frank Pastori, Schenley, Anglo Bank, American Trust Co., and Barnhill Distilleries.

¹³Pet.'s Exhibit No. 52; Pet.'s Exhibit No. 15, paragraph 7, production contract.

¹⁴For example, in Pet.'s Exhibit No. 2 are a large number of warehouse receipts to Schenley, beginning with No. 3152-B, in which the storage charge is 20¢ per barrel. Pet.'s Exhibit No. 3, receipt No. 3201-B is similar. In Pet.'s Exhibit No. 59, a charge of 20¢ per barrel was made to Beaulieu Vineyards, Mohawk Liquor, Barnhill Distilleries, and Larkmead Vineyards (see warehouse receipt Nos. 3483-B, 3663-B, 3666-B, 3668-B, 3688-B, 3542-B, 3526-B, 3527-B).

The bonded warehouse of Hedgeside was located in the country just outside of Napa, California. Directly adjacent to the two large storage buildings of I.R.B.W. No. 2 is a small office building.¹⁵ Both the distillery office and the warehouse office were located in this office building. The office of the U. S. Government Gauger, who was required to keep the storage buildings securely locked at all times, was also located in the same office building, and was described in Hedgeside's Federal Permit, Form 27-D, as "on the bonded premises".¹⁶

The warehouse receipt books were kept in a small room off the main office in a steel vault. When a warehouse receipt was issued by Hedgeside, two copies were made out at the same time and the copies kept with the warehouse receipt book in the vault.¹⁷ The warehouse receipt books, together with the copies, were found in the vault by the Trustee when he took over the premises.¹⁸

Schenley held and still holds the original Hedgeside warehouse receipts for the spirits. It paid storage on the spirits to Hedgeside, and paid storage to the Trustee. The receipts are regular on their face and recite the serial numbers of the barrels of spirits purchased by Schenley.

¹⁵See Pet.'s Exhibit No. 69, sketch of the premises.

¹⁶Pet.'s Exhibits Nos. 47, 69; R. pp. 710-720.

¹⁷R. pp. 710-11, 759, 805-806, et seq.

¹⁸R. pp. 590-91.

From these facts and others,¹⁹ the Referee and the District Court made Findings of Fact that:

(1) Schenley purchased the spirits for value from the owner of the spirits.

(2) At all times Schenley held Hedgeside warehouse receipts for the spirits.

(3) Hedgeside held Federal and State licenses authorizing it to store spirits for persons licensed to deal in bulk spirits, and authorizing it to issue warehouse receipts for that storage.

(4) Hedgeside charged a reasonable rate in the regular course of business for such storage.

(5) At all times copies of the warehouse receipts were kept at the principal place of business of Hedgeside and at the warehouse.

The Courts below concluded that a bona fide purchaser holding warehouse receipts from a warehouseman was entitled to the possession of his goods.

We think that the Findings of Fact are correct and supported by an abundance of evidence. Appellants ask this Court to overturn them on the basis of arguments, asserted inferences, and claims of “undisputed evidence” which is in fact disputed or irrele-

¹⁹Appellants did not choose to make the entire record below part of the printed record on appeal. Should the Findings of Fact be challenged by appellants, the Court is asked to review the evidence *without all of the evidence before it*. This Court has stated that it will not go behind the Findings with such a record. (*United States v. Foster*, 123 F. (2d) 32.) The Eighth Circuit has ruled likewise. (*Sublette et al. v. Serval*, 124 F. (2d) 516.)

vant. These same arguments *on the evidence* have twice been submitted to the trier of facts and found lacking in merit.

We will again point out their lack of merit in replying to appellants' contentions.

III.

ARGUMENT.

A. HEDGESIDE WAS A WAREHOUSEMAN AS DEFINED BY THE WAREHOUSE RECEIPTS ACT.

As a preliminary matter, there seems to be no point in debating with appellants at this point in the proceedings on petitioner's "burden of proof", which has been met, or in a claimed "presumption of ownership" arising out of possession by the bankrupt warehouseman. (Appellants' Brief, pp. 11-12.) Those are matters for the trial Court, and neither Hedgeside nor the Trustee in its shoes has made any claim of *ownership*. Any presumptions on this appeal are in support of the judgment, not against it.

Appellant's arguments fall into three main categories, and we will answer them in like manner.

(1) Copies of warehouse receipts were kept at the warehouse.

Appellants concede that copies of warehouse receipts were kept at Hedgeside's principal place of business, but contended that there was no "satisfying evidence" that copies of the warehouse receipts were kept "at the warehouse". This argument is based upon the assump-

tion that the statute requires copies to be kept *inside* the locked warehouse (where no one could inspect them), rather than *at* the warehouse, i.e., in the adjacent warehouse office along with the business records of the I.R.B.W.

The opinion of the District Court on this point reads as follows (R. pp. 123-4):

“The Referee found as a fact that at all times copies of warehouse receipts issued by Hedgeside, covering whiskey and spirits stored in No. 2, ‘were kept at said principal place of business’ and ‘at said warehouse’.

“Hedgeside had two warehouses that made up No. 2. The Hedgeside office and the storekeeper-gauger’s office were in a third building. The receipts were made out in triplicate, and the receipt books were stored in a vault in ‘a little extra room off of the main office’. The space between the building where the office is and ‘where the warehouse starts’ is ‘a truck and a half’.

“Apparently because the copies of the Warehouse receipts were not kept in the warehouse building itself, the Trustee argues that copies were not kept ‘at the warehouse’.

“This Court is not impressed with such hair-splitting. Section 3440.5 requires that ‘Such copy shall be open to inspection upon written order of the owner or lawful holder of such receipt’. Obviously, a person presenting such an authorization would go to the office building—not to the warehouse structure itself, which Federal law requires shall be ‘kept securely locked, and shall at no time be unlocked or opened or remain open except in

the presence of such storekeeper-gauger or other person who may be designated to act for him'. 26 USCA section 2872.

“But perhaps ‘We must speak by the card, or equivocation will undo us.’

“Fernald’s ‘Connectives of English Speech,’ at page 55, has the following:

‘At is less definite than in. At the church may mean in, or near the church.’

“The Court holds that copies of Schenley’s warehouse receipts were kept at No. 2, as required by Section 3440.5.”

As the District Court indicated, the very *purpose* of the statutory language is to make the copies available for inspection. They cannot be inspected in a locked storage building. A warehouse is not a self-operating vending machine, it requires an office of some kind. A “warehouse”, on the common sense of it, includes the *storage* buildings and the *office for those buildings*. A copy here was kept in that warehouse office.

We can only add the definition contained in Webster’s New International Dictionary, Unabridged Second Edition, to show that the legislature meant to and did use the word it wanted:

“AT—primarily *at* expresses the relation of presence or contact in space or time, or of direction toward. It has much the sense of *to* without its implication of motion, and is less definite than in, on, by, etc. Thus *at* the house may be in or *near the house*. When reference to the interior

of any place is made prominent, *in* is used; when a *place* is regarded as a mere local point, *at* is more commonly employed."

The finding that copies of warehouse receipts were kept at the warehouse is supported by the evidence, and is correct.

(2) Hedgeside was "lawfully" engaged in storing.

Here appellants say that Schenley "failed to produce satisfactory evidence * * * that Hedgeside was *lawfully* engaged in storing" (Brief, p. 12). Apparently this is because Hedgeside "did not file its storage rates with the California Public Utilities Commission" (Brief, p. 13). Appellants do not, of course, point out how or why Hedgeside could or should so file its rates, or that the Public Utilities Commission required it to do so. By the same token Hedgeside did not file rates with the Interstate Commerce Commission, the FCC, FTC, or a number of other regulatory bodies.

The Court will note that the opinion of the District Court does not discuss this point. That is so because it was raised before the Referee, the law was briefed and the Referee was not impressed with appellants' argument. It therefore *was not* brought to the attention of the District Court either at oral argument or in the briefs. It is here resurrected by innuendo.

Hedgeside was not a *public utility*. It did not solicit storage from the general public, nor hold itself out as willing to serve the public. It did store bulk spirits

under licenses from the Federal Government and the State of California which expressly authorized it to do so and to issue warehouse receipts. Since it was not a public utility it did not file rates with that Commission, nor have appellants ever produced any evidence that the Commission required such filing.²⁰

Hedgeside had all of the licenses required of it. The Courts below found that Hedgeside was "lawfully" operating a warehouse. There is no evidence to the contrary.

(3) Hedgeside was engaged in the business of storing goods for profit.

The evidence shows that Hedgeside stored goods for others at a regular rate of compensation. Appellants

²⁰The California Public Utilities Commission is charged with enforcing its own requirements; presumably it would have demanded that Hedgeside comply had those requirements applied. Appellants returned from the Commission empty handed in a search for evidence of such a demand. The reason for this is clear. The California Public Utilities Act (Deering's General Laws, Vol. 2, Act 6386) first includes the term "warehouseman" in its definition of "public utility". But Section 21½ then defines what is meant by such a public utility warehouseman, as follows: "*Warehouseman defined.* The term 'warehouseman' when used in this Act, includes every person, corporation * * * owning, controlling, operating or managing any building, or structure, or warehouse in which merchandise * * * is regularly stored for the public generally * * *". In line with this definition the California Supreme Court has held that to be a public utility a business must be *dedicated to the public use*, requiring a general offer of services to the public at large. (*Allen v. Railroad Commission*, 149 Cal. 78, 89; *Story v. Richardson*, 186 Cal. 162, 167.) The California Commission has therefore repeatedly ruled that warehouses which did not hold themselves out to serve nor serve the general public, were *not* public utilities and were *not* required to file their rates. (*L.A. Warehousemen's Assoc. v. Dohrmann*, 37 Cal. Rail Comm. 525, 526; *L.A. Warehousemen's Assoc. v. Lyons*, 37 C.R.C. 133; *Case No. 4090*, 40 C.R.C. 107.)

contend that the storage was not "for profit". The Referee and the District Court found that the contention was not supported by the evidence, nor by legal authority.

As the District Court stated, "The products of a distillery, when 'removed from the place where they were distilled and not deposited in a bonded warehouse as required by law', are subject to a tax amounting to several times their value and collectible 'immediately'. 26 USCA Section 2800(b)(2). Many distillers operate an Internal Revenue Bonded Warehouse, where the merchandise can be stored for eight years without payment of a tax. See 26 USCA Sections 2872 and 2879(b)." (R. 117.) The District Court went on to note that Hedgeside held State and Federal permits and licenses to engage in business as a bonded warehouse, to manufacture distilled spirits, and to conduct a "public warehouse".

With a bonded warehouse on its premises, and with the necessary permits and licenses, Hedgeside could store its own production in bond, and also store in bond for qualified licensees. It chose to utilize its warehouse, where space was available, for additional revenue.

Hedgeside charged a regular rate for storage and other handling charges. The storage rate was either 10¢ or 20¢ per barrel per month, and 25¢ in-and-out charge. In the case of Schenley, Hedgeside was obligated by its production contract to store up to 10,000 barrels at the 10¢ storage rate, and did so. This was

large volume storage. In other cases, including storage for Schenley which was not under contract, Hedgeside charged 20¢ per barrel per month. The storage customers included a variety of persons and firms, many of whom paid the 20¢ rate.²¹

The warehouse was managed as one part of the Hedgeside Corporation. There was no evidence introduced by appellants to show that this portion of the business operated at a loss, and no evidence whatever concerning the costs and expenses of the warehouse.²² Schenley did introduce evidence of a regular storage rate, showing that the warehouse was operated for hire. Hedgeside received substantial revenue from its storage.

As against this evidence which supports the Findings of Fact, appellants make several statements of what they claim to be "uncontradicted evidence".²³ Appellants are mistaken.

Two of these statements (Numbers 1 and 5) we have already dissipated. The fact that Hedgeside did not advertise to the general public, was not a public utility, and therefore was not required to file rates as a public utility with the California Public Utilities Commission, is of no moment here. We are concerned

²¹Some of the storage customers and references to warehouse receipts are listed in footnotes 12 and 14, supra, Statement of Facts.

²²To follow appellants' argument here, Schenley should have had a C.P.A. audit the books of account of Hedgeside to make sure Hedgeside was not operating at a loss, lest the warehouse receipts be declared invalid.

²³Appellants' Brief, pp. 12-13.

here with the application of the Uniform Warehouse Receipts Act, not the Public Utilities Act. As the Courts have pointed out, the Uniform Act does not depend on other regulatory statutes enacted for other purposes.²⁴

Next appellants assert that Hedgeside charged rates less than 50% of those charged by certain public utilities (Number 6). In the first place *the assertion is erroneous*. As we have pointed out previously, the record shows that Hedgeside's rates to Schenley under production contract, and to Barnhill under similar circumstances, were 10¢ per barrel for the storage of thousands of barrels. The record also shows storage for smaller customers at 20¢ per barrel per month. Appellants' Exhibit 35, the schedule of rates for metropolitan public utilities, shows a rate of 20¢ per barrel per month for a 55-gallon barrel, the size used by Hedgeside.

In addition, appellants did not enlighten the lower Courts nor this Court as to how a comparison in rates between Hedgeside and public utilities in San Francisco and Stockton, not operated with a distillery, could be made. This Court instead is asked to *assume* a similarity in operation, and then to make a factual finding, contrary to the finding of the trial Courts,

²⁴“The Uniform Warehouse Receipts Act defines and fixes the rights and liabilities of the parties storing the grain, and is a full and complete treatise on the subject, and makes no distinction between public and private warehouses or between bonded or unbonded warehouses, but regulates the storage of goods.” (*Joy v. Farmer's Nat. Bank*, 11 Pac. (2d) 1074, 1075.)

that Hedgeside could not under any circumstances make money from storing goods.²⁵ We think that this is asking too much of the doctrine of judicial notice.

The last assertion of “uncontradicted evidence” claims that Hedgeside did not attempt to fix rates which could show a profit, and refused to store for anyone who did not have a production or bottling contract with it (Numbers 2, 3, 4). This is based *solely on the testimony of appellants’ witness Logan*, the sales manager and an officer and director, who soon proved that he knew little or nothing about this phase of the business.

Logan stated that he reported to Stone, the President of Hedgeside and owner of substantially all of its stock (R. 860). *Stone* handled purchases (R. 861), negotiated the production contracts (R. 863), determined where to warehouse it (R. 863), and set the storage rates (R. 867). Logan then testified that *Stone* had made no estimate of whether or not the rates would return a profit when *Stone set the rates* (R. 878). It is apparent that this was an *opinion* of Logan’s as to what *Stone intended*. The worth of

²⁵It should be noted that respondent Bank’s Exhibit No. 35 was received into evidence over objection, with *no foundation whatever* of a similarity of rents, wages, overhead, etc. between metropolitan San Francisco and the countryside outside Napa. Further, no background of *bulk storage of spirits*, as done by Hedgeside, was shown for the public utilities which store anything for anybody in any quantity. (R. 942-3.) The record can be searched in vain for evidence of any similarity of operation. The result is akin to comparing the prices of a wholesale grocery in the country with a retail drug store in San Francisco. The Referee and District Court considered the tariff for public utilities. It is apparent from the Findings that the trial Courts did not consider it helpful.

Logan's opinions are painfully evident upon reviewing his testimony. Logan was a dummy director and officer who was entirely excluded from management by Stone, and consequently knew very little of even Hedgeside's most important transactions, let alone Stone's intentions.²⁶

All of this evidence and testimony was before the Referee and the District Court. The evidence upon which appellants rely was *not* "uncontradicted". The trial Courts found as a fact that Hedgeside operated a warehouse business "for profit". Appellants now ask this Court to upset that finding of fact of the trial Court on the basis of Logan's testimony alone, and in utter disregard of all of the other evidence on the point. As this Court has stated, the findings of fact are not to be so lightly disregarded. (*Goldstein v. Polakof*, 135 Fed.(2d) 45.)

²⁶For example, Logan testified that:

(1) Hedgeside did not store goods in the Franciscan bonded warehouse. (R. 860, 870.)

(But Hedgeside did. (Findings, R. 19-20.))

(2) He knew of only one case where Hedgeside stored for a person without a production or bottling contract. (R. 873-4.)

(The evidence shows at least 15 other persons had goods in storage at Hedgeside, and there is no evidence whatever that any except Schenley and Barnhill had a production or bottling contract with Hedgeside. (Footnotes 12 and 14, supra.))

(3) He knew of the Hedgeside-Schenley production contracts only by "hearsay", having been told of them by "Stone or someone else". (R. 908.)

(The contracts called for the sale of a large share of Hedgeside's production of spirits (Pet.'s Exhibits Nos. 15 and 22), and Logan was the *sales manager*.)

(4) Stone *never consulted him* regarding the financial condition of Hedgeside. (R. 927.)

(5) He signed warehouse receipts for Stone without knowing anything about the transaction. (R. 909-10.)

If it is assumed that the phrase “for profit” were used in the Uniform Act in the technical sense of excess of receipts over expenditures, as contended by appellants, we are satisfied that the evidence clearly shows that Hedgeside intended to make money on its storage. For all that the record shows it did. The findings in that regard are correct.

But according to the cases interpreting the Uniform Act, the phrase “for profit” is *not* used in the sense advocated by appellants, and *no case involving a warehouse or the Uniform Act has been cited by appellants to support their argument.*²⁷ “For profit” in the Uniform Act means “*for compensation*” or “*for hire*”, and is nothing more or less than a codification of the common law distinction between a *gratuitous* bailee and a *bailee for hire*.

The opinion of the District Court correctly sets out the few cases in point as follows (pp. 119-122) :

“In support of his position, the Trustee cites two California decisions involving facts far different from those before this Court, and containing language inferentially *adverse* to the Trustee’s contention.

“One case is that of *Sinsheimer v. Whitely*, 111 Cal. 378, 380 (1896), decided long before the passage of the California Warehouse Receipts Act. There no storage whatever was charged. In the course of its opinion, however, the Court used the following language:

²⁷Appellants now cite for the first time two *tax cases* which have nothing whatever to do with the Uniform Warehouse Receipts Act or warehouses. (Appellants’ Brief, pp. 14-15.)

“ ‘A warehouse receipt has been defined to be a written contract between the owner of the goods and the warehouseman, the latter to store the goods and the former to *pay for that service*. (Hale v. Milwaukee Dock Co., 29 Wis. 488; 9 Am. Rep. 603) * * * But it is said that the tickets were the only vouchers issued by the defendant company, and hence must be treated as warehouse receipts. Rather, it seems to us, that circumstance tends to show that said company was not a warehouseman at all in the sense which the law attributes to that term—*an inference corroborated by the fact that it makes no charge for storage*. It is only persons who pursue the calling of warehouseman—that is, receive and store goods in a warehouse as a business *for profit*—that have power to issue a technical warehouse receipt, the transfer of which is a good delivery of the goods represented by it. (Shepardson v. Cary, 29 Wis. 42; Bucher v. Commonwealth, 103 Pa. St. 534; Edwards on Bailments, sec. 332)’. (Emphasis supplied.)

“From the foregoing, it will be seen that the expressions ‘to pay for that service’, ‘charge for storage’, and ‘for profit’ are used interchangeably.

“The other case, Harry Hall & Co. v. Consolidated Packing Company, 55 C.A. 2d 651, 654 (1942), likewise was one in which no storage was charged. As to the point now under discussion, the Court merely said, citing the Sinsheimer case, *supra*:

“ ‘In the present case defendant was not a public or a private “warehouseman” * * *, nor was it to receive *compensation* for the storage.’

“It is difficult to see how the Trustee or the Bank can derive comfort from either of these California cases. They simply are not in point.

“In *Fidelity & Deposit Co. v. State of Montana*, 9 Cir., 92 F. 2d 693, 696 (1937), the Court said:

“ ‘That Chatterton & Son was a public warehouseman within the general meaning of the term is not questioned. A storage and handling charge was regularly exacted from all those using the warehouse facilities and negotiable warehouse receipts were uniformly issued. 67 C.J. 443.’

“Section 57 of the Warehouse Receipts Act—a section that seems to have escaped the notice of counsel—provides:

“ ‘Interpretation of act. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.’⁶

“Since the ‘law of those states which enact it’ includes not only state statutes but also judicial decisions interpreting those statutes, the opinions of state judges in other commonwealths will be helpful here.

“In *New Jersey Title Guaranty & Trust Co. v. Rector*, 75 A. 931, 932-933 (1910), the New Jersey Court of Errors and Appeals—the highest in the

⁶See also the cases referred to in Subsection (a) of Section 13 of this opinion.”

State—construed this identical Section 58 as follows:

“Section 58 declares “warehouseman” to mean a person lawfully engaged in the business of storing goods *for profit*, and the bill of complaint alleges that the complainant is conducting the business of running safe deposit vaults, and warehousing valuable goods and chattels *for hire*, which sufficiently describes “warehouseman” as defined by the act, * * *” (Emphasis supplied.)

“The Uniform Warehouse Receipts Law was construed by the same Court in *New Jersey Manufacturer’s Association Fire Insurance Company v. Galowitz*, 150 A. 408, 409 (1930). There the Court remarked:

“The legal concept of the action comes within the general subject of bailee for hire. The automobiles were stored *at a price* in defendant’s garage. The principle of liability is that of a warehouseman.” (Emphasis supplied.)

“In *E. V. Webb & Co. v. Friedberg*, N.C., 126 S.E. 508, 509 (1925), the Supreme Court of North Carolina implied that the mere fact that a receipt gives the ‘storage rates’ indicates that the goods are stored ‘for profit’. The Court said:

“If the concern is engaged in the business and goods are stored *for profit*, the statute applies. It matters not if the concern stores its own and also the goods of others (as was done by *Hedgeside*). The receipt issued terms itself “warehouse receipt” and *shows on the face that the goods are stored for profit; it gives the “storage rates”*.” (Emphasis supplied.)

“This Court holds that Hedgeside was engaged in the business of storing goods for profit, within the meaning of the California Warehouse Receipts Act.”

We may add the definition of warehouseman contained in 56 American Jurisprudence, Sec. 2, page 320:

“*Section 2. Definition*—A warehouseman in the general acceptance of the term is one who receives and stores goods for others as a business, and for a *compensation or profit*.”

As in other aspects of this proceeding, appellants find great fault with the cases which the District Court found to be controlling, but cite *no case* themselves concerning warehousing which even remotely supports their contentions. Appellants say that the following cases cited in the opinion of the District Court are “not in point”:

In *New Jersey Title Guaranty & Trust Co. v. Rector*, 75 Atl. 931, 932-3, the question was whether or not the bank as a *warehouseman under the Uniform Act* could interplead rival claimants, where the complaint alleged a storing *for hire*.

In *New Jersey Mfg. Assn. Fire Insurance Company v. Galowitz*, 150 Atl. 408, 409, the question was whether or not a garageman storing cars *at a price* was a *warehouseman* under the Uniform Act.

In *E. V. Webb & Co. v. Friedberg*, 126 S.E. 508, 509, the question was whether or not a tobacco com-

pany running a warehouse was a *warehouseman* under the Uniform Act, wherein the Court flatly stated that the *storage rates* recited on the fact of the receipts showed that the goods were stored *for profit*.

The two California cases are fully discussed in the opinion of the District Court. As the District Court stated, they were cited by *appellants*, and if they are in point at all, they are *adverse* to appellants' contentions.

As a factual matter the Referee and District Court found that Hedgeside in the regular course of business stored in bond for persons licensed to deal in bulk spirits, and charged a reasonable rate for the storage. The lower Courts also found that Hedgeside had all of the necessary Federal and State licenses, and found that at all times copies of warehouse receipts were kept at Hedgeside's principal place of business and at the warehouse. Those Courts therefore concluded that Hedgeside was a warehouseman under the Uniform Warehouse Receipts Act.

There is more than substantial evidence to support the Findings of Fact, and appellants have fallen far short of showing that the Findings are "clearly erroneous". Since Hedgeside was a warehouseman, the provisions of Civil Code 3440 have no bearing on goods represented by warehouse receipts. (*Heffron v. Bank of America*, CCA-9, 1940, 113 F.(2d) 231, and cases cited in the opinion of the District Court, R., pp. 115-117.)

The order below should be affirmed on this ground alone.

B. CIVIL CODE SEC. 3440 DOES NOT APPLY TO GOODS TRANSFERRED INTO STORAGE IN AN INTERNAL REVENUE BONDED WAREHOUSE.

This is, of course, a purely legal point, since it is undisputed that all of the spirits here were transferred into bond within 72 hours of their production.²⁸

Both the Referee and the District Court concluded that storage of alcoholic products in an Internal Revenue Bonded Warehouse constitutes a change of possession under a Bulk Sales Law. They found the law well settled in that regard.

Appellants insist that the decisions on the point (all adverse to appellants' contentions) are based on "local law" and that "California law" somehow is completely different. The opinion of the District Court disposes of the same arguments and cases presented by appellants in their brief:

"Because of the Government's tight control over distilleries, it is well settled that storage of alcoholic products in an Internal Revenue Bonded Warehouse constitutes a sufficient change of possession under the Bulk Sales Law.

"Not only, as we have seen, are distilled spirits immediately subject to tax, but Section 2872, *supra*, provides for the joint custody of the proprietor of the warehouse and a Government officer, called the 'storekeeper-gauger'.

"Section 2873, as modified by Reorganization Plan No. 26 of 1950, prepared by the President

²⁸The Court's attention is invited to the testimony of Del Tredici, who described the barreling and warehousing operation, R. pp. 209-220, 247-255.

of the United States pursuant to the provisions of the Reorganization Act⁸ of 1949, provides that 'The establishment, construction, maintenance, and supervision of internal revenue bonded warehouses shall be under such regulations' as the Secretary of the Treasury shall prescribe.

"Section 2879(a) requires that distillers of all spirits removed to an Internal Revenue Bonded Warehouse shall enter the same for deposit in such warehouse, under such regulations as the Secretary of the Treasury⁹ shall prescribe.

"Section 2915 contains detailed instructions regarding the keeping of the storekeeper-gauger's warehouse book.

"Referring to the Government's heavy hand upon distilleries, in *Taney v. Penn National Bank of Reading*, 3 Cir., 187 F. 689, 697, 698, 699, 700, 703 (1911), the Court said:

"The tax on whisky is remarkable and distinguished from other excise taxes, by the fact that it is in amount many times the cost of the whisky itself, the tax of \$1.25 a gallon being about five times the ordinary value of the whisky at the still.¹⁰ It is manifest that this extraordinary tax could not be collected on the whisky as it comes from the still, or when it is first put in barrels, without hardship to the distiller or owner so great as to discourage its manufacture or confine such manufacture to persons or corporations of great wealth. It was

⁸See note under 5 USCA section 241, Cumulative Supp. (1950).

⁹See note 8, *supra*.

¹⁰Under a 1951 amendment to 26 USCA section 2800(a)(1), the tax was \$10.50 on each proof gallon."

necessary, or at least very desirable in the interest of the public revenue, that reasonable opportunity should be given to the distiller, to allow the product of his distillery to become marketable by the ripening process alluded to, before he was called upon to pay the tax * * *

* * * * *

“ * * * the warehouse is theoretically in the joint custody of the store-keeper and proprietor, but, in fact, the control of the store-keeper is complete and practically exclusive. The lock is put on by the government and the key is in the storekeeper’s possession. * * *

* * * * *

“ To all the world, but especially to those engaged in the business of distilling and of buying and selling whisky, it was apparent that the physical custody and control of the whisky here in question was not in the distiller and vendor, but in the revenue officers of the United States, and in neither case was the distiller capable of making physical delivery to his pledgee or vendee. All those doing business with these distillers, including creditors, were bound to take notice of this notorious physical fact and were put upon due inquiry, and had imposed upon them the duty of self-protection, as to the title of the goods so situated * * *

* * * * *

“ *The physical possession was not transferred, because it was out of the power of the vendor to transfer the same, without the payment of a tax many times the value of the goods sold, one of the very objects of the law*

providing for the government's custody of the whisky presumably being that the payment of the tax might be deferred for a number of years without interfering with the right to transfer the property therein * * *

* * * * *

“ ‘As the reason for the rule making fraudulent, as against creditors, transfers of personal property, unaccompanied by actual delivery, is based upon the policy of preventing the fictitious credit permitted by allowing possession to remain in the debtor, it is pertinent to remark, in regard to a situation which, under the laws of the United States is, as we have said, *sui generis*, that, as the creditors of the Distilling Company had no access to the interior of the warehouse, they could not claim to have been misled to their injury. They cannot be deemed to have given credit upon the faith of whisky in a warehouse of which they had no means of ascertaining the contents.’

“The Taney case, *supra*, was affirmed by the Supreme Court at 232 U.S. 174 (1914).

“In an effort to distinguish the Taney decision on the facts, the Trustee and the Bank repeatedly point out that ‘other warehouses were so close to Hedgeside that whiskey and spirits could be stored elsewhere within 72 hours, so that tax payments could be avoided’, while that was not true in Taney.

“Precisely such an argument, however, was repudiated in the Supreme Court's Taney decision. Mr. Justice (later Chief Justice) Hughes said, at pages 185-186 of his opinion:

“ ‘It is said that the distiller need not use his own warehouse, but may place the goods in one of the general bonded warehouses established under the act of 1894 (28 Stat. at L. 564, 565, chap. 349). The appellee asserts that this would be impracticable; that no general bonded warehouse had been established in the collection district in question; that there are only twelve in the entire country, with a capacity that is extremely small in comparison with the output of the distilleries. *But, aside from this, the distillery warehouse is equally recognized by law; it is a “bonded warehouse of the United States”.* If it is a fit place for storage, the distiller is not obliged to remove the spirits elsewhere. * * *

“ ‘The fundamental objection is that the custom, to which the entire trade is adjusted, is opposed to public policy. But we know of no ground for thus condemning honest transactions which grow out of the recognized necessities of a lawful business. The case is not one where credit may be assumed to be given upon the faith of the ostensible ownership of goods in the debtor’s possession. Every one dealing with distillers is familiar with the established practice in accordance with which spirits are held in store, under governmental control, and are transferred by the delivery of such documents as we have here.’ (Emphasis supplied.)

“The Bank and the Trustee insist that the Taney case can be distinguished on the ground that California law is different from Pennsylvania, and that the Supreme Court decided the

case 'under Pennsylvania law.' In the excerpt just quoted, however, Mr. Justice Hughes was expounding, not state law, but a Federal statute relating to 'a bonded warehouse of the United States'.

"Similarly, in *Marchants' National Bank of Baltimore v. Roxbury Distilling Company*, DC Md., 196 F. 76, 101 (1912), the Court discounted the effect of the local law upon the problem now being discussed:

" 'But independent of the special enactment of Maryland with regard to distillery warehouses, I am in full accord with the special master in his conclusion that, *because of the peculiar situation of the distilled spirits stored in a bonded distillery warehouse*, there is by the transfer effected by the warehouse certificate as full a delivery of the goods as is commercially possible *under the special circumstances attending distilled spirits stored in the bonded distillery warehouses of the United States.*' (Emphasis supplied)¹¹."

In the cases cited in the opinion of the District Court, Pennsylvania, Kentucky, and Maryland all have a Bulk Sales Law similar to California's Civil Code, Sec. 3440. In each case it was held that *the requirement of change of possession* (the only portion

¹¹See also *Bache v. Hinde*, 6 Cir., 6 F 2d 508, 510, note 3 (1925), certiorari denied, 269 U.S. 581 (1925); *Brown v. Cummins Dist. Corp.*, DC Ky., 53 F Supp 659, 664 (1944); *Wells Fargo Nev. Nat'l Bank of S.F. v. Haslett Warehouse Company*, 60 Cal. App. 225, 228-229 (1922), petition for hearing in the State Supreme Court denied (1923); *Lederer v. Railway Terminal & Warehouse Co.*, Ill., 178 N.E. 394, 396 (1931)."

of Sec. 3440 involved here) was satisfied by a transfer into bond. In each case the decision depended upon *Federal statutes* relating to Internal Revenue Warehouses, not upon "local" statutes. These Federal statutes apply to a California distillery quite as much as to a Kentucky distillery.²⁹

Appellants rely on *Stewart v. Scannell*, 8 Cal. 81 (1857). The case was decided *years before passage of the Internal Revenue Code*, which established the heavy Federal taxes and requirements for Internal Revenue Bonded Warehouses. In 1857 there were no I.R.B.W.'s and no tight Federal control of the distillery business.

The only other California case cited by appellants involving alcoholic spirits is *Guthrie v. Carney*, 19 Cal. App. 144, involving tax-paid wines and liquors in barrels and bottles. The case *did not* involve a transfer into an I.R.B.W., nor did it discuss the problem.

Appellants also cite two California cases on the "joint custody" point, one involving partnership property, the other property held in common. (App.'s Brief, p. 28.) Obviously a transfer from one partner to another, or one tenant in common to another, is no transfer at all. That is a different case from a transfer into a bonded warehouse, padlocked by a U. S. Government employee. The California Court in *Wells Fargo Bank v. Haslett W. Co.*, 60 Cal. App. 225,

²⁹Since California has had but one or two distilleries, whereas Kentucky, Pennsylvania and Maryland have many, it is only natural that this phase of the law should develop in those whiskey-producing states.

pointed out that where goods are stored in a U. S. bonded warehouse, that fact is notice of the control of the United States with respect to their release.

In one breath appellants argue that no "exception" has been written into Sec. 3440 in the case of whiskey and spirits although it has in the case of brandy, and therefore the legislature did not intend to except whiskey and spirits.³⁰ In the next breath appellants cite other instances where *no statutory exception* has been made, but by *case law* a delay in transferring possession is excused "when immediate delivery is well-nigh impossible" (App.'s Brief, p. 29). In each instance the exception has been in effect for many years without visible effect upon the legislature or the statute.

While so conceding that there are exceptions to Sec. 3440 (or instances wherein its requirements are *satisfied*) which are *not contained in the statute*, appellants insist that the delay in Schenley's withdrawal of the goods "has continued for too long a time", citing a case involving a transfer of hay. (App.'s Brief, p. 30.) "Since it was feasible to make partial withdrawals, it was equally feasible to withdraw the whole", assert appellants. Entirely feasible, *except for the payment of the heavy tax which put the spirits in the warehouse in the first place*.³¹ The question is not whether

³⁰With one, or possibly two distilleries in the whole State, it seems likely that the California legislature had no intention either way—it simply did not consider the point.

³¹A tax of \$10.50 per gallon times 55 gallons per barrel times approximately 8,933 barrels in all.

it was feasible for Schenley to withdraw, but *whether Schenley was required to do so.*

Finally, as was pointed out by the Supreme Court in the *Taney* case, there is no room for the argument that creditors are misled because of storage in an I.R.B.W. Appellants' closing argument on the point (Brief, p. 33) would lead the Court to believe that such is the case here. But a review of the Findings and the opinion of the District Court reveals that appellant bank lost most of its money taking warehouse receipts for goods which the *bankrupt* did not produce or own at any time, but which had been transferred into the bankrupt's warehouse as *bailee for the owner*.³² Appellant bank lost its money because of the criminal acts of a dishonest warehouseman who forged duplicate warehouse receipts, a crime for which Stone served a prison term. The only misleading in this case was an outright criminal act.³³

Independently of the Uniform Warehouse Receipts Act, it is settled law that a transfer into bond satisfies the change of possession required by the Bulk Sales Law.

³²See R. pp. 84-91, 100-105. The 2,759 barrels of whiskey, as against 574 barrels of spirits, were sold by Franciscan and transferred to the Hedgeside warehouse, where Stone forged warehouse receipts, as the owner of the whiskey, and pledged them to the bank without the knowledge of the true owners.

³³It should also be noted that whereas now dire results are predicted by appellants, should these warehouse receipts be recognized, appellant bank, as well as Bank of America, American Trust Company, Schenley, and a score of other firms found no difficulty in recognizing them for years, until Stone forged worthless receipts. These dire predictions have the color of afterthoughts.

IV.

CONCLUSION.

The Referee and the District Court concluded on two separate and independent grounds that Schenley was entitled to the goods it had purchased.

First, Hedgeside was a warehouseman under the Uniform Warehouse Receipts Act, which repealed Sec. 3440 in so far as it applied to warehoused goods. Where appellants' arguments are factual, they are contrary to the Findings of Fact of the trial Courts and contrary to the overwhelming weight of the evidence. Where appellants' arguments are legal, they are contrary to the cases interpreting the Uniform Act, and appellants have themselves cited no case or other authority which supports their own strained interpretation. Schenley's warehouse receipts are regular and valid on their face, and appellants have shown no defect in them.

Second, these spirits were transferred into bond in an Internal Revenue Bonded Warehouse at the time of sale. All the cases on the point hold that such a transfer into bond satisfied the requirements of the Bulk Sales Law.

Schenley was an innocent purchaser for value. The goods were purchased in good faith and the purchase price paid to the owners of the goods. No valid reason has been advanced to avoid the effect of those purchases. No good reason has been advanced to justify turning over Schenley's goods to creditors of Hedgeside.

It is submitted that the order of the District Court, granting the petition in reclamation, should be affirmed.

Dated, San Francisco, California,
September 11, 1953.

Respectfully submitted,
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IN THE

United States Court of Appeals
For the Ninth Circuit

THE ANGLO CALIFORNIA NATIONAL BANK
OF SAN FRANCISCO,

Appellant,

vs.

SCHENLEY INDUSTRIES, INC.,

Appellee.

CHARLES W. EBNOTHER, Trustee of the
Estate of Hedgeside Distillery Corpo-
ration, Bankrupt,

Appellant,

vs.

SCHENLEY INDUSTRIES, INC., a corpora-
tion,

Appellee.

APPELLANTS' CLOSING BRIEF.

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No. 13,600

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APPELLANTS' CLOSING BRIEF.

I.

ONLY QUESTIONS OF LAW ARE PRESENTED.

One thing is quite apparent in a reading of the Appellee's response to the appeal taken herein and that is that the Appellee is so shaky in its legal

contentions that it seeks to deprive this Court of the right of review by arguing that there is a conflict in the testimony before the Referee in Bankruptcy upon which he and the District Court have made findings and that accordingly there is nothing which this Court can overturn. This contention is repeated constantly throughout the brief (pp. 2, 3, 4, 10, 11, 14, 15, 17, 20, 26, and 36). This argument is entirely without merit. The evidence before the Referee was in large part documentary and we know of no instances where the testimony of witnesses was in conflict. The same argument was presented by the Appellee to the District Court when that Court was reviewing the findings and order of the Referee. Such contention was rejected by the District Court who held (R. 95),

“The Court is inclined to agree with the Trustee and the Bank that there are no substantial issues of fact presented to it for determination.

“That being the case, the only questions presented here are those of law. In such a situation, it is familiar doctrine that a reviewing court must exercise its independent judgment.”

The District Court then closed its opinion (R. 132) with the following statement:

“Under all the facts, *which are undisputed* and under all the legal principles applicable to those facts, to deprive Schenley of what, in good faith, it bought and paid for, would be ‘rigor and not law.’

“The Referee’s findings of fact and conclusions of law, except as hereinbefore noted, and his order are approved and affirmed.” (Italics ours.)

Not only has the Appellee not presented any evidence showing a conflict of material facts but it is seeking to overthrow the findings of the very District Court whose order it is relying upon to support its position.

II.

HEDGESIDE DID NOT QUALIFY AS A WAREHOUSEMAN UNDER THE CALIFORNIA WAREHOUSE RECEIPTS ACT.

The Appellee states (Appellee’s Brief, p. 20) that “the trial courts found *as a fact* that Hedgeside operated a warehouse business ‘for profit’.” (Italics ours.) No such “finding of fact” appears either in the order of the Referee or the District Judge (R. 16-30, 78-132). The Court below did hold, *as a conclusion of law*, that Hedgeside was storing “for profit” *within the meaning of the California Warehouse Receipts Act* (R. 122). It did so, as is abundantly clear from the Court’s opinion, solely because of an erroneous conclusion that it was only necessary to charge *something* to be in the business of storing “for profit” within the meaning of the Act (R. 115-122). That it decided the case on that grounds is corroborated by the fact that Appellee, until the preparation of its brief filed with this Court, steadfastly argued to the Referee and the District Court

that to qualify as a warehouseman under the California Act it was only necessary that "a charge" be made. At page 21 of Appellee's Brief filed with this Court Appellee argues that "'For Profit' in the Uniform Act means '*for compensation*' or '*for hire*' and is nothing more or less than a codification of the common law distinction between a *gratuitous* bailee and a *bailee for hire*."

This same argument was made, in the identical language, in Appellee's Brief filed with the District Court (p. 30), and the case was not only argued to the Referee on that basis by the Appellee but tried on that basis, and that is one of the reasons that Appellee never attempted to introduce any evidence below on the question of whether or not Hedgeside was in the business of warehousing for profit. It is certainly partly the reason that it is unable to point to any evidence taken by the Court below which would support a finding of fact that Hedgeside was in the business of storing for profit. The other and more important reason is, as is borne out by the testimony of Mr. Logan, Hedgeside never intended to make a profit on its warehousing. In short, this case, up until now, has been tried by the Appellee on the basis that if Hedgeside charged as much as the traditional peppercorn for storage that that constituted being in the business of storing for profit within the meaning of the California Act. The fallacy of this wholly unsupported statement of the law has been briefed by us at pages 14-22 of our Opening Brief and, ac-

cordingly, rather than repeat same at this time we refer the Court to the analysis there appearing. Appellee has made no attempt to answer this analysis other than to quote the opinion of the District Court. Such a procedure will avail the Appellee nothing as the District Court adopted *in toto* the fallacious argument of the Appellee.

To add confusion, however, Appellee now recedes from its former position for the first time and attempts to argue that the Referee and District Court found "as a fact" that Hedgeside was in the business of storing for profit. (Appellee's Brief, pp. 15-20.)

This change of heart and position comes too late as the factual record was established under the previous erroneous theory of law. Outside of the fact that one is not permitted to reverse his legal position in the trial of a case for the first time in the appellate court (*Sacramento Suburban Fruit Lands Co. v. Melin*, 36 F.2d 907 (9th Cir. 1929)), Appellee runs into the difficulty that it has not produced in the Court below evidence to support the burden of proof imposed upon it. Appellee attempts to skim over this defect by arguing (Appellee's Brief, p. 11) that "any presumptions on this appeal are in support of the judgment,". But the plain facts are that at the time of bankruptcy Hedgeside had possession of the grain spirits which the Appellee sought by reclamation petition to obtain the possession of. Such goods were produced by Hedgeside, sold to the Appellee, and the possession retained by Hedgeside. Under the circum-

stances, there is a *conclusive* presumption by California law (*Civil Code*, §3440) that said transfer was void as to the creditors of the vendor unless the buyer (Appellee) can bring itself within the terms of a statutory exception to Section 3440. The burden of proof of showing qualification under such exception lies upon the person claiming it. (See authorities, Appellants' Brief, pp. 11-12.) There is no conceivable statutory exception to §3440 under which Appellee might qualify except *California Civil Code* §3440.5 which provides that, in lieu of transfer of the goods, warehouse receipts must have been issued and delivered by a "warehouseman" as defined by the California Warehouse Receipts Act. In order for the Appellee to qualify under this exception it was obligated to show *strict* conformance.

One of such qualifications was that the issuer of the receipt be "engaged in the business of storing goods for profit." Appellee failed to so qualify as it failed to introduce *any* evidence to show Hedgeside was engaged in the business of storing for profit. All that the Appellee did in the Courts below was to show that "a charge" was made. It made no effort to show the cost or expenses of warehousing by Hedgeside. It did not even attempt to refute by other testimony the testimony of Mr. Logan, the Sales Manager and Officer and director of Hedgeside, who signed most of the receipts upon which the Appellee here relies, to the effect that no attempt was ever made to determine whether or not the transaction of warehousing was itself profitable as that term is commonly used

(R. 878). It now argues that Mr. Logan, although Sales Manager, Officer and Director, and the signer of most of the warehouse receipts, was not informed as to what Mr. Stone, the President of Hedgeside (which is a corporation by the way), subjectively intended. Yet no attempt was made by Appellee to produce testimony from Mr. Stone either by deposition or otherwise to that effect. No argument was ever made to either the Referee or the District Court that Mr. Logan's testimony was not to be believed for any reason. Nor did the Referee or District Court ever raise such a question. In fact, the District Court conceded that the testimony below was "undisputed".

For the first time, in this Court, the Appellee refers to the fact that there were an infinitesimal number of receipts issued in which the warehouse charge was 20¢ per barrel per month instead of the usual 10¢—and this is true even though appellants introduced evidence of the published rates of warehousemen operating internal revenue bonded warehouses and storing for a profit in communities other than the community in which Hedgeside was located, which rates were more than 100% higher than the usual rate of 10¢ charged by Hedgeside. And this is true even though Appellee must have recognized that it had the burden of proof of showing qualification under any exception (§3440). Appellee never attempted to make any detailed comparison between the warehousing operation of Hedgeside and the warehousing operation of public warehouses admittedly lawfully in the business of storing for profit. All Appellee did

was to induce the Referee and District Court to enter orders which are in error because based upon unsound legal principle—and then when that principle is being brought to light before this Court attempt to preclude review by arguing that legal conclusions of the Referee and District Court are findings of fact based upon conflicting evidence.

As previously pointed out, Schenley has never mentioned the existence of a 20¢ storage charge for some barrels in any argument heretofore advanced before either the Referee or District Judge. The number of barrels stored under said 20¢ charge is small as compared to the thousands of other barrels subject to the customary 10¢ storage charge. In the main, the 20¢ charge was imposed under storage contracts executed during a two month period (August 29, 1946 to October 28, 1946) with Schenley for potato spirits. In only five instances were similar contracts entered into with respect to grain spirits, and this was only during a three-week period in 1946 (October 7, 1946 to October 29, 1946). A few drums of neutral grape lees brandy and raisin brandy were also stored subject to a 20 cent charge. In view of the short period of time during which 20 cent storage contracts were executed, the small quantity of merchandise subject to this charge, and the fact that the *product* covered by a 20 cent charge was not regularly stored or produced by Hedgeside (the overwhelming bulk of its business was in the production and sale of whiskey and grain spirits and not potato spirits or neutral grape lees or raisin brandy) the 20 cent charge may only be

regarded as exceptional and of no significance unless it be taken as an indication that Hedgeside recognized that at its customary 10 cent rate, applicable by the way to the precise merchandise now in dispute, it lost money on its storage.

At pages 17 and 19 of its brief Schenley attempts to discount the significance of Hedgeside's customary 10 cent storage rate as compared to the 20 cent rate charged by metropolitan warehousemen by implying that there was some sort of quantity discount in effect at Hedgeside which was responsible for its lower rate. This contention is utterly fallacious. In the first place, under Schenley's production contracts (Pet.'s Exhibits Nos. 15 and 22B) Schenley paid only 10 cents if it stored one barrel or ten thousand barrels. It was required to store nothing, and could withdraw all storage at any time it chose. In no sense did Schenley receive a low rate in consideration of alleged "bulk storage". Secondly, if "bulk storage" permits a lower rate (and Schenley has produced no evidence to that effect) this fact would redound to the benefit of metropolitan warehousemen and their customers, not to Hedgeside. For the greatest quantities of spirits and whiskey are naturally stored in the areas of greatest demand. In short, if Schenley's "quantity discount" theory be accepted one would expect the storage rate in San Francisco, Stockton and Sacramento to be lower than the Hedgeside charge.

III.

GOODS STORED IN AN INTERNAL REVENUE BONDED WAREHOUSE ARE NOT EXEMPTED FROM THE APPLICATION OF CIVIL CODE §3440.

Schenley's next argument is that §3440 of the *California Civil Code* does not apply in the case of goods transferred into storage in internal revenue bonded warehouses. It is conceded by Schenley, in this instance at least, that the Courts below were only confronted with a legal question (Appellee's Brief, p. 27). Schenley's argument appears at pages 27 to 35 of the Appellee's Brief and consists in large part of a mere quotation of the statements made by the District Court in its opinion. The erroneous position taken by the District Court in its opinion is fully covered in Appellants' Brief, pages 23 to 33, inclusive. Accordingly, we shall only address ourselves now to the few contentions made by Schenley in its Answering Brief which might be deemed to go further than the District Court did.

First, Schenley contends (Appellee's Brief, p. 32) that "Pennsylvania, Kentucky and Maryland all have a bulk sales law similar to California Civil Code §3440" and for that reason cases from said jurisdictions exempting distilleries from the requirements of a change of possession are persuasive here. With this argument we are sharply in disagreement as, in the instance of Pennsylvania, the case of *Taney v. Penn. Nat. Bank*, 187 Fed. 689 (3rd Cir. 1911), relied on by Schenley, arose under common law based upon the Statute of Elizabeth (13 Elizabeth, C. 5) (p. 696

of the opinion). The Pennsylvania Court there cited *Stevens v. Gifford*, 137 Pa. 219, 20 Atl. 542 (1890) wherein it is stated that Pennsylvania had no bulk sales statute whatsoever. In other words, at the time of the *Taney* decision there not only was no statute similar to the California statute but there was no statute at all.

In the case of Kentucky, Schenley refers to the cases of *Bache v. Hinde*, 6 F. 2d 508 (6th Cir. 1925), and *Brown v. Cummins Dist. Corp.*, 53 F. Supp. 659, 664 (D.C. Ky. 1944). Neither case involves the requirement of a transfer of possession or refers to any Kentucky statute on this point.

In the case of Maryland, *Merchants Nat. Bank v. Roxbury Distilling Co.*, 196 Fed. 76 (D.C. Md. 1912), is cited. That case did not involve law, such as exists in California, conclusively presuming a retention of possession as fraudulent, as we pointed out in more detail at page 31 of our Opening Brief.

Schenley attempts to distinguish (Appellee's Brief, p. 33) the two "joint custody" California cases referred to in Appellants' Brief by stating that *Newell v. Desmond*, 63 Cal. 242, 15 Pac. 369 (1883), involved a transfer from one partner to another partner and that the case of *Haster v. Blair*, 41 C.A.2d 896, 107 P.2d 933 (1940), a transfer from one tenant in common to another. This attempted differentiation is difficult to follow as the transfers in each case were to third parties and not to either a partner or a tenant in common.

The case of *Brown v. O'Neal*, 95 Cal. 262, 30 Pac. 538 (1892), is another decision in which §3440 was applied to a transfer from one tenant in common to an outsider.

We have no quarrel with the statement that *Wells Fargo Bank v. Haslett W. Co.*, 60 Cal.App. 225, 212 Pac. 647 (1923), holds that storage of goods in a United States bonded warehouse is notice of the fact that the United States controls the release of such goods but we do deny that such proposition has any relevancy here. See, *Joseph Herspring v. Jones*, 55 Cal. App. 620, 203 Pac. 1038 (1921).

An examination of the legislative history of §3440, *California Civil Code* (Appellant's Opening Brief, pp. 24-25) unearths the fact that in 1951 the legislature made an exception to §3440 so as to permit the storage of *brandy* by the vendor or producer in its warehouse without bringing into play the conclusive presumption of §3440. Such amendment and exception did not include whiskey or grain spirits. Accordingly, the maxim *expressio unius est exclusio alterius* comes into full play and we must reach the conclusion that such exception in the case of whiskey and grain spirits was not intended by the legislature. Schenley's only answer to this contention is by way of a footnote on page 34 of its Answering Brief in which it is stated that since there were only one or two distilleries (of whiskey and grain spirits) in the State of California it seems likely that the California legislature had no intention either way, or that it simply did not consider the

point. Such is certainly a nonchalant answer but we submit a wholly ineffective one. The tax on brandy is as high as on whiskey or grain spirits and it must be met unless the goods are stored in an internal revenue bonded warehouse within 72 hours, just as in the case of whiskey and grain spirits. *No argument has been advanced by the Referee, the District Court, or Schenley, as to why brandy should be treated any differently in the California change of possession statute than whiskey or grain spirits.* Yet in the case of brandy our California legislature took the position that no statutory or case law exception to §3440 existed in California with respect to the storage of brandy in an internal revenue bonded warehouse. If that be true, and it cannot be denied that it is true, then our legislature must have considered that no statutory or case law exception existed in the case of whiskey and grain spirits.

Not only that, but in passing such legislation, in the case of brandy, our California legislature must have recognized that distillers were not “warehousemen” as defined by the California Warehouse Receipts Act at the time of the passage of the brandy amendment, which was 1951. Otherwise, a distiller of brandy could have claimed exemption under §3440.5 of the *California Civil Code*, just as Schenley is presently claiming, and we insist erroneously so, in the case of grain spirits.

In the case at bar, an act of the California legislature (§3440) and an amendment (§3440.5) placing a

limitation or exception thereon is being construed and not only is Schenley deviating from the usual usage of the simple and unambiguous words employed therein but is urging a liberal construction in the case of an exception, which should always be strictly construed. And it is doing so notwithstanding the fact that the legislature has clearly indicated its intent by passing a further amendment and exception to §3440 in order to permit a producer of brandy, a commodity in the identical position as whiskey and grain spirits, to escape the operation of said §3440. If Schenley's position were sound, a brandy producer could escape the section's effect through Amendment 3440.5 and there would have been no need for the legislature to pass a further exception. In like manner, if storage in an internal revenue bonded warehouse precluded the operation of §3440 in the case of whiskey and grain spirits, it would also preclude the operation of said section in the case of brandy, as the commodities are produced, distributed, and taxed in the identical manner.

IV.

THE GOODS WERE NOT KEPT "AT THE WAREHOUSE".

Schenley contends (Appellee's Brief, pp. 11-14) that Hedgeside met the requirement of Amendment 3440.5 that a copy of each warehouse receipt be kept "at the warehouse" where the goods covered are stored as well as "at the principal place of business" of the

warehouseman, since it kept duplicate copies of the original warehouse receipt at the principal place of business or in a small vault in the office building of the distillery. The District Court agreed, as did the Referee, that there is no dispute whatsoever as to the physical facts. The difficulty arises purely in the construction of the meaning of §3440.5. The District Court concluded that the preposition "at" was less definite than the preposition "in". With this statement we do not disagree. Our position is that §3440.5 presents an exception or limitation upon the operation of §3440. Therefore, it must be construed strictly. The preposition "at" does not necessarily mean "in" but it is most frequently used interchangeably with "in". In other words, they are synonyms.

Webster's New International Dictionary:

"*Syn.* AT, IN. When reference to the interior of any place is made prominent, IN is used: When a place is regarded as a mere local point, AT is more commonly employed; as, to look for a book *in* the library, to meet a friend *at* the library; 'he appointed regular meetings of the States of England twice a year *in* London' (*Hume*); 'an English king was crowned *at* Paris' (*Macaulay*). *In* is used before the names of countries or districts and (usually) of large cities; as, we live *in* America, *in* New York, *in* the South. *At* is commonly employed before names of houses, institutions, villages, small towns; as, Milton was educated *at* Christ's College, money collected *at* the customhouse, I saw him *at* the jeweler's, we live *at* Concord."

The amendment does not necessarily require that copies be kept inside the warehouse under the lock and key in the control of the storekeeper-gauger but it certainly does require that copies be kept within the confines of the warehouse building and not in the main office of the distillery, located in a separate building in no way physically connected with the warehouse, where an entirely different operation is being conducted. Had the legislature intended only that a copy be kept on the premises where the warehouse is located it would appear that they could easily have so stated. If each provision of the amendment is given due weight there would appear to be no logic in having a provision that a copy be kept "at the principal place of business" as well as "at the warehouse" if the latter requirement could be complied with by merely keeping two copies at the principal place of business. Furthermore, it appears absurd to prepare and keep two copies at the principal place of business when one copy would serve just as well. The District Court emphasized the provision of the amendment requiring that a copy be "open to inspection". What possible benefit is the right to inspect a copy of the warehouse receipt if the goods covered may not be inspected at the same time because in a locked warehouse? Why need there be a copy at the warehouse as well as at the principal place of business if inspection is to be guaranteed only as to the copy and not as to the commodity covered? An interested owner and lawful holder of the original receipt could just as well inspect the copy at Timbuktu as at a separate building in the neighborhood

when the goods covered are under lock and key and the key held by a difficult-to-find government agent. What the legislature obviously intended was that there be the opportunity to inspect a copy of the warehouse receipt at the main office or principal place of business and a right to inspect a copy along with the goods at the warehouse. It appears to us that Hedgeside recognized this situation when it made out duplicate copies of warehouse receipts. It failed, however, to keep one of the copies "at the warehouse".

V.

HEDGESIDE'S LICENSES DID NOT QUALIFY IT AS A "WAREHOUSEMAN".

To qualify as a warehouseman under the California Act one must be lawfully engaged in the business of storing. If, in its storing operation, Hedgeside did not comply with the laws and regulations promulgated in connection with or by any state or government agency, it is not lawfully qualified to do business as a warehouseman under the California Act. The federal and state licenses issued to Hedgeside, and referred to at pages 7, 8, 14, and 15 of Appellee's Brief, did not convert Hedgeside into a warehouseman as defined by the California Act. The federal license only evidenced compliance with the federal regulations contained in 26 C.F.R. 185. The state licenses only evidenced compliance with the regulations of the California taxing authority. Neither of them *ipso facto* qualified the bankrupt "to engage in the business of storing goods for profit" as required by

the California Warehouse Receipts Act. In short, the federal and state laws and regulations, under which said licenses were issued to Hedgeside, are designed to further the enforcement of certain federal and state tax statutes. They go no further. As evidence concerning the issues in the case at bar said licenses have only a negative value, for without them Hedgeside would have been storing spirits *unlawfully* and thus would have failed to satisfy the definition of "warehouseman", whether or not in so storing it was also "engaged in the business of storing goods for profit". Notwithstanding, the possession of said licenses in no sense satisfies the *additional* requirements of the applicable statute as stated in the last quotation.

VI.

CONCLUSION.

Schenley in its Answering Brief has added nothing in the form of legal arguments to the legal conclusions of the District Court and Referee. The material facts, as found by the District Court, are undisputed. This review requires nothing more than that a proper construction be placed upon three unambiguous California statutes consonant with the decisions of this state. §3440 of the *California Civil Code* is in full play and requires a holding that the transfer of each of the 4,484 barrels of grain spirits, in the possession of the bankrupt at the time of bankruptcy, be held to be conclusively fraudulent as against the creditors, unless this Court is prepared to hold that Hedgeside was a warehouseman as defined in the Cali-

California Warehouse Receipts Act. This Court is in as good a position as the District Court was to determine that question. There is no evidence upon which one could base a finding that Hedgeside was "lawfully engaged in the business of storing goods for profit", therefore it was not a "warehouseman" as defined in the California Warehouse Receipts Act. There is no statutory exception to the operation of §3440 in the case of "grain spirits" other than by one "storing goods for profit" and there is no California decision holding that storing in an internal revenue bonded warehouse defers the operation of §3440. We respectfully submit that the District Court's opinion and order should be reversed as to said 4,484 barrels of grain spirits.

Dated, San Francisco, California,
September 28, 1953.

Respectfully submitted,

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United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 13611

MELVIN GRIFFETH and LOIS D. GRIFFETH, *Appellants*,

vs.

UTAH POWER & LIGHT COMPANY, a Corporation, *Appellee*.

BRIEF OF APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

HONORABLE CHASE CLARK, *Judge*

WALTER H. ANDERSON and GUS CARR ANDERSON,
Residence: Pocatello, Idaho

NEWEL G. DAINES, Residence: Logan, Utah

L. DELOS DAINES, Residence: Salt Lake City, Utah

Attorneys for Appellants

FILED

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United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 13611

MELVIN GRIFFETH and LOIS D. GRIFFETH, *Appellants*,

vs.

UTAH POWER & LIGHT COMPANY, a Corporation, *Appellee*.

BRIEF OF APPELLANTS

This action was filed originally in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock, by the appellants against appellee, and was thereafter removed to the United States District Court of Idaho, Eastern Division.

COMPLAINT

The complaint alleges that the appellee was a corporation of the State of Maine, that the appellants were owners of lands and lessees of other lands located in Franklin County, Idaho. The lands were described by meets and bounds; that the lands were farm lands at the date of the injuries complained of, said lands were planted in crops and located upon the lands were livestock, poles, wheat, barley and fences.

That Bear River is a stream of water which has its source in the State of Utah, flows in a general northerly direction into the State of Wyoming and thence in the State of Idaho and thence in a general direction of south into the State of Utah; that it runs in a general southerly direction through the lands owned and leased by the appellants.

That appellee is engaged in the sale of electricity and prior to the date of the injuries alleged were controlling the flow of Bear River by diverting the waters into Bear Lake and into a reservoir known as Oneida Station, and also at a point near Soda Springs for the storage of water for the generation and manufacture of electricity, and in so doing, constructed dams in the channel of Bear River, particularly at Oneida Station and Soda Point and near Bear Lake, and by the use of the dams appellee did, and at the time of the injuries complained of, control and regulate the flow of Bear River.

That on January 7, 1949, and for approximately five days prior thereto appellee carelessly and negligently discharged into the river, water in such quantity and volume that the banks of the river, at a point about 40 rods from property line of appellants, could not contain said water, and that the water at said point did overflow the banks and flooded appellants property, and the reason the water overflowed the banks at said point was because the appellee discharged water into said river and the same froze over, whereupon the appellee then discharged additional quantities of water that flowed over the frozen water and overflowed the banks at the point above mentioned, and that appellee discharged said water into the said river after quantities had frozen in the bed thereof and had caused it to overflow at the point above mentioned; that the appellee had notice and had been warned that appellants' lands would be flooded by the manner of discharging water into said stream, and that the appellee at said time and place discharged into said stream a great quantity of water far in excess of the normal flow thereof.

That the appellee knew or should have known at the time it discharged water into said river that the banks of said river could not contain said volume and quantity

of water and that as a result of said carelessness, appellants' lands were flooded, and damaged, their cattle drowned and the other personal property thereon destroyed; that the damages sustained were proximately caused by the appellee's negligence and misconduct as it was warned in advance of the flooding of said appellants' lands that the same would occur unless measures were taken to prevent it, and that appellee neglected, declined, failed and refused to take any measures to prevent flooding of appellants' lands.

That the appellants did not anticipate and did not expect and could not foresee that the water would flow to the extent it did and would reach and drown said cattle.

Appellants asked for judgment against appellee for their actual damages in the sum of \$6,577.00, and for the sum of \$10,000.00 punitive damages, costs of suit and general relief. (R. 7-15)

ANSWER

FIRST DEFENSE

Appellee alleged that appellants failed to state facts upon which relief could be granted.

SECOND DEFENSE

Appellee admitted it was a Maine corporation; that appellants were the owners of the lands set forth in their complaint; that Bear River flowed in the directions alleged.

Appellee alleged it was a public utility corporation engaged in the generation of electricity by both hydroelectric and steam generators, and the sale thereof to the public, that its business in all respects was lawful and that its business at all times referred to in appellants' complaint was operated and maintained in a careful and lawful manner.

Appellee denied all other allegations of appellants' complaint except those admitted.

THIRD DEFENSE

That the property owned and leased by the appellees was subject to a release and easement in the words and figures as follows:

RELEASE AND EASEMENT

This agreement made and entered into this 22 day of December, 1926, by and between Utah Power & Light Company, hereinafter referred to as "Grantee," and George Thomas and Anna S. Thomas, his wife, hereinafter called "Grantors", witnesseth:

That for a valuable consideration the receipt of which is hereby acknowledged, the Grantors above named hereby release and discharge the Utah Power & Light Company, its successors and assigns, from any and all claims heretofore caused to the lands by flooding or by the impounding or storage of the waters of Bear Lake, or by the fluctuation of the flow of said river, or by depositing of ice thereon, or otherwise, and/or due to the maintenance or operation of Grantee's Oneida Power Plant or other plants operated by said Grantee on said Bear River;

And for said consideration, above named, Grantors, their successors and assigns, hereby grant unto said Utah Power & Light Company, its successors and assigns, an easement for and the right to continue as aforesaid the manipulation and fluctuation of the flow of said river as it passes in its natural channel through or along the lands owned, claimed or possessed by the Grantors, located in Section 17, Township 15 South, Range 39 East, B.B. & M., particularly including, but not limited to, the following land, to-wit:

The Southwest Quarter of the Northwest Quarter, the East half of the Southwest Quarter and the Southwest Quarter of the Southwest Quarter of Section 17, Township 15 South, Range 39 East, B.B. & M., excepting approximately 10 acres heretofore transferred to the Riverview Sanitarium Company, containing 150 acres, more or less.

And for said consideration any damages that may result from future flooding or depositing of ice on said land caused by the fluctuation of the flow of said river in the normal operation of Grantee's plant or plants, up stream from Grantor's land, are hereby waived and released, provided future fluctuations shall not exceed those heretofore occurring in the operation of said Oneida Plant.

In witness whereof, the parties have hereunto set their hands this 22 day of December, 1926.

That appellants acquired the property subject to the release and easement, and that they were barred from maintaining cause of action set forth in their complaint.

FOURTH DEFENSE

Appellee alleged appellants' cause of action was barred by the statute of limitation, by provisions of Sec. 5-218 of Idaho Code, for the reason that the complaint was not filed nor the action commenced within three years from and after the date said cause of action arose.

It alleged that if appellants' property was damaged as alleged, that said damage was caused by appellants' negligence in failing to exercise ordinary care for the removal of livestock and other personal property from the premises in time to avoid damage thereto. (R. 19-23).

JURISDICTION

This is a civil action between citizens of different states where the amount in controversy exceeds the sum

of \$3,000 exclusive of interest and costs, and the United States District Court of Idaho has jurisdiction thereof, under Title 28, Sec. 1332, U.S.C.A. (R. 3-5, 8).

This action was transferred by the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Bannock upon motion of the appellee. (R. 3-7).

This appeal is from a final judgment of the United States District Court for the State of Idaho. The United States Court of Appeal for the Ninth District has appellant jurisdiction of this action under Title 28 U.S.C.A. 41. (R. 52).

APPELLEE'S MOTION FOR SUMMARY JUDGMENT

The appellee moved the court for summary judgment in its favor pursuant to Rule 56 of Federal Rules of Civil Procedure upon the grounds that the lands referred to and described in appellants' complaint were formerly owned by George Thomas and Anna E. Thomas, and the lands were acquired by appellants subsequent to December 22, 1926, and subsequent to January 11, 1927, and the lands owned and leased by appellants as set forth in their complaint were subject to an easement granted on the 22nd day of December, 1926, by George and Anna E. Thomas to the appellee.

In its motion, the appellee set forth the release and easement hereinbefore set forth. *Supra*.

It set forth that the operation of its Oneida Dam referred to in appellants' complaint was carried on during the months of December 1948, and January 1949, in a normal manner that the fluctuation of the waters of Bear River by reason of the operation of said dam was no greater than the fluctuation which occurred prior to December 22, 1926, that by reason of said easement the

lands of appellants, both owned and leased, were subject to the terms of the easement, and that the appellee was not liable to the appellants for the damage referred to in appellants' complaint.

Appellee based its motion upon the pleadings in the cause and upon the affidavits of J. A. Hale and C. L. Swenson. (R. 23-27).

AFFIDAVIT OF J. A. HALE

The affidavit of J. A. Hale set forth that he was a graduate civil engineer and had pursued his profession as an engineer since 1911; that in 1913 he was employed by the appellee as civil engineer; that he continued in such employment until 1923 when he became assistant chief engineer of appellee company, which position he occupied until 1926 when he became its chief engineer, which position he occupied until 1937 when he was made vice president of appellee company in charge of engineering, which position he has held and now holds; that he was familiar with the construction of appellee's Oneida dam and power plant which was built in the years 1913 to 1920, and that at all times since the construction of the said dam he has "been personally familiar with said dam and personally familiar with the operation thereof".

That said dam and power plant was built for the purpose of impounding the waters of Bear River and employing its waters for the generation of hydro-electric power.

Affiant stated prior to December 22, 1926, "the land referred to and described in appellants' complaint was the property of George Thomas and Anna E. Thomas, his wife; that prior to December 22, 1926, George Thomas and Anna E. Thomas asserted a claim against appellee and demanded damages for the alleged flooding of lands referred to and described in appellants' complaint, that the said claim was compromised and settled on December

22, 1926, that George Thomas and Anna E. Thomas signed, executed and delivered to appellee a release and easement. Said release and easement was set forth in the affidavit verbatim, he stated that the lands referred to and described in said release and easement included the lands referred to and described in appellants' complaint, that in the month of December, 1948, and in the month of January, 1949, "he was familiar with the operation of the Oneida power plant of appellee and that the same was operated normally and in the same manner in which it was operated prior to December, 1926".

Affiant further stated, "that fluctuation of the Bear River by reason of the use and operation of the Oneida dam was no greater in the months of December, 1948, and January, 1949, than were fluctuations which occurred prior to December 22, 1926".

AFFIDAVIT OF C. L. SWENSON

The affidavit of C. L. Swenson was to the effect that he was the County Recorder of Franklin County, Idaho; that he had in his possession and under his control, files and records of Franklin County, Idaho, and that on January 12, 1927 at 12:25 P.M. on said day the easement in question was recorded in Book 5 of Miscellaneous Records, Page 4 of the records of Franklin County, Idaho. A certified copy of the easement was marked, "Exhibit "A", and made a part of the affidavit.

That on March 15, 1941, at 11:00 o'clock A.M. there was filed for record with the Recorder of Franklin County, Idaho, a certain deed executed by George Thomas and Anna E. Thomas to Edward T. Griffeth, which deed was dated August 10, 1935, and acknowledged November 6, 1935, and recorded in Book 33 of Deeds at Page 589 of the records of Franklin County, Idaho. A certified copy

of the deed was attached to affidavit and marked "Exhibit "B".

That on September 27, 1946, a deed from Edward T. Griffeth and Lillian B. Griffeth, his wife, to Melvin P. Griffeth and Lois D. Griffeth, dated September 19, 1946, was recorded in Book 39 of Deeds at Page 342 of the records of Franklin County, Idaho, a certified copy of the deed being attached to said affidavit, and marked Exhibit "C" and made a part thereof. (R. 33-42). (End of affidavit.

The lands described in the easement, Exhibits "A", and in the warranty deed, Exhibits "B", and "C" is the same land as described in appellants' complaint. (R. 8, 34-42).

In resistance to appellee's motion for summary judgment the appellants filed the affidavit of Edward Griffeth.

AFFIDAVIT OF EDWARD GRIFFETH

It was set forth in the affidavit of Edward Griffeth that he was 75 years old, that he was familiar with the lands described in the affidavit of J. A. Hale that two or three years before December 22, 1926, he entered into a contract with George E. Thomas and his wife to purchase the land; he did not have the original contract nor a copy thereof, did not know where such contract is or if it is in existence; that upon entering into the contract he held possession of the land and remained in possession until he sold to Melvin Griffeth that he was in actual possession of the land and occupancy thereof on December 22, 1926, when said purported easement set out in the affidavit of J. A. Hale was executed; that at the time he had paid considerable portion of the purchase price of said lands to George Thomas and that he

did not know of the execution of the easement, did not consent thereto, was not consulted with regard to the same by either George E. Thomas or any other person, that he conveyed the lands to Melvin Griffeth on September 19, 1946, that from the time he purchased the lands from George E. Thomas up until he sold the lands to Melvin Griffeth the river never at any time overflowed its channel, nor was he disturbed or annoyed by excess water on said lands, and that the river remained in its channel all during the time of his possession and occupancy. (R. 43).

AFFIDAVIT OF EVELYN GRIFFETH

In the affidavit of Evelyn Griffeth she stated she was 70 years old, that she lived upon the lands adjoining the lands involved in this lawsuit and "that this affiant knows of her own personal knowledge that for 45 years with the exception hereinafter noted, she had lived upon same and that the said river never was out of its channel."

Affiant further states, "that in January 1949, the said river overflowed its channel on said land and deep enough on said lands of Melvin Griffeth at said time to reach the armpits of her son Von Griffeth when he went out on the said lands of Melvin Griffeth to try to save cattle while the river had risen; that all of these things are of the personal knowledge of this affiant and are not based on anything someone might have told her." (R. 45).

The appellee, in rebuttal, filed the affidavit of S. J. Quinney.

AFFIDAVIT OF S. J. QUINNEY

Mr. Quinney set forth in his affidavit that he had read the affidavits of Edward Griffeth, J. A. Hale and C. L. Swenson, and that the person referred to in the affidavit of Edward Griffeth as "George E. Thomas" and

referred to in the affidavits of J. A. Hale and C. L. Swenson as "George Thomas" were one and the same man; that he knew George Thomas in his lifetime and that said George Thomas died in the city and county of Salt Lake, State of Utah, on April 11, 1951. (R. 46).

STIPULATION AND ORDER

At the time the court granted appellants' motion to amend their complaint it was agreed by the parties and the court so ordered that the land which appellants had under lease and described in their amendment to complaint, (R. 13-15), was subject to a similar easement as that described in appellee's Answer and Motion for Summary Judgment and that appellee's motion for summary judgment and affidavits in support of motion and answer would cover the land not only owned by the appellants but leased by them as well. (R. 59-63).

HEARING ON THE MOTION FOR SUMMARY JUDGMENT

At the hearing on motion for summary judgment the appellants moved to strike J. A. Hale's affidavit beginning with paragraph 3 to the end thereof. (R. 47).

ORDER

The motion to strike certain portions of the affidavit of J. A. Hale was denied, and the court ruled on the motion for summary judgment as follows:

"NOW, THEREFORE, the Court is of the opinion that the Summary Judgment should be granted in part as suggested at oral argument in that plaintiffs are bound by the release and easement agreement. This can be taken care of at the time of trial.

The Summary Judgment will be denied subject to the above reservation." (R. 47-48).

STATEMENT OF FACTS

The case was tried before a jury, and at the conclusion of appellants' case, upon appellee's motion, the court directed a verdict in favor of appellee and against appellants. (R. 151, 143). Judgment was entered accordingly. (R. 52).

At the beginning of the trial the district court ruled that the only evidence to be offered by appellants was whether there had been an abuse of the easement set forth in appellee's answer and any damages by reason thereof. (R. 61-63)

The purported release and easement was never offered nor received in evidence. It was pleaded as an affirmative defense. (R. 20, 140-142.)

At the conclusion of appellants' case, the court ruled that the appellants had failed to show that the appellee had been negligent in the handling of the easement. (R. 140-142).

This case arose out of the flooding of appellants' lands on or about the 7th day of January, 1949, by the waters of Bear River. (R. 73, 94, 95).

Bear River is a stream of water having its source in Utah, from which it flows in a general northerly direction into the State of Wyoming, thence into the State of Idaho, thence in a general direction of south into the State of Utah. As it passes on its way into Utah it runs through appellants' lands. (R. 8, 9, 19).

About 1912 to 1914 the appellee built a dam across Bear River at Oneida, Idaho. (R. 73, 78). This dam, together with other water storage facilities were used by appellee for storage of water from the watershed of Bear River. The dam was also used in the regulation and manipulation of the flow of the river. (R. 131, 133, 134, 136, 138).

The Oneida Dam is situated about 14 miles north of appellants' property. (R. 81). All of the water flowing down Bear River above the dam must come over or under it. (R. 129).

Between Oneida and appellants' property the stream is augmented by four small creeks. (R. 111).

Since the erection of the dam at Oneida the appellee has regulated the flow of the water passing down Bear River and as it passes north of and through appellants' lands and to the south thereof. (R. 79, 80, 87, 138).

Prior to the appellee building its dam at Oneida, the waters of Bear River flowed uncontrolled in its natural channel (R. 79) and during the winter months the river would freeze over and the water would flow under the ice, never overflowing its banks. (R. 79).

After the appellee built its dam at Oneida it commenced to regulate the flow of the river. In the morning it would send limited or small amounts of water from its dam at Oneida, and in the afternoons it would send forth large quantities of water, (R. 80, 87) and in the winter months when small amounts of water were sent down the river it would freeze over and then in the evening when larger amounts of water were sent down the river, it would cause the ice already formed to break up. This ice would settle to the bottom of the channel, other ice would be deposited on it by the same process, then such would be broken loose, causing ice jams to form in the river channel. (R. 79, 80).

Prior to the building of the dam at Oneida and after the building of the dam, appellants' lands had never been flooded until they were flooded in January, 1949. (R. 79, 80, 98, 103, 104, 106, 113, 116, 118, 123).

However, after construction of the dam and before 1949 the river had in some instances, north of appellants'

property, flooded some low lands and sloughs. (R. 106, 118).

Ice jams occurred near appellants' property during the years, 1947, 1948, 1949, and several years prior thereto. (R. 81).

In the months of December, 1948 and up to and including the 7th day of January, 1949, the appellee manipulated and regulated the volume of water flowing down Bear River between the Oneida Dam and the lands of the appellants. (R. 138)

On January 2, 3, 4, 5, 6 and 7, 1949, it discharged down Bear River from its dam at Oneida more water than flowed into its natural facilities from the river's watershed. (R. 146).

The months of December, 1948, and January, 1949, were cold months and appellee knew of such as it kept daily temperature records. (R. 84, 86, 107, 123, 125).

A few days prior to January 7, 1949, Melvin Griffeth, one of the appellants, noticed that the water from Bear River, because of ice jams to the south of his property, had started to flood the south portion of his lands, (R. 73, 81, 82), and on three different occasions before January 7, 1949, he talked to Mr. Cushman, manager of Utah Power & Light Company, Preston Division, telling him that his lands were being flooded. (R. 74-76, 79).

A few days prior to January 7, 1949, Mr. V. D. Smart, maintenance foreman of the State Highway Department of Idaho, (R. 88), noticed that ice jams were forming in the river near the Preston-Dayton River Bridge, (R. 89), which lies about two miles south of appellants' lands, (R. 71), and prior to January 7, 1949, he called appellee at its Oneida Station and told it the road was being flooded and it looked as if they would lose the bridge if something wasn't done. (R. 90-92).

Ice jams formed in the river north of appellants' lands, causing the water to back up, (R. 82, 83, 89) and on January 7, 1949, (R. 76, 95) it left its channel, flowing to the southwest over the appellants' lands, or in other words, it came from the northeast. (R. 95, 98). The water did not come out of the channel as it passed through appellants' lands. It came from the north over the lands of other persons. (R. 82).

The flood, as it passed over appellants' lands, reached a width of about 80 rods and a depth of several feet. (R. 97)

It was stipulated as a result of the flood 12 head of cattle were drowned, the realty injured, and other personal property destroyed, in the total value of \$5,027.00. (R. 70).

The purported release and easement was never offered nor received in evidence, the court ruling that the burden was upon the appellant to prove the appellee's easement by offering it in evidence and then to show that there had been a violation of the easement. The court did not define what the easement was. (R. 140-142.)

The easement was pleaded as an affirmative defense by the Appellee. (R. 20), (R. 142.) The court in effect held that the easement was part of Appellants' case and that it was on the appellant to first introduce the easement in evidence—valid or invalid—and then to show a violation of it. (R. 142.)

The appellant refused to consent to assume any burden except that which the law imposes on them. (R. 141)

At the conclusion of the Appellants' case, the Appellee moved the court for a directed verdict which was granted.

JUDGMENT

The court pursuant to directing a verdict entered up judgment in favor of appellee against appellants. (R. 52).

QUESTIONS PRESENTED

1. The appellant contends that the court committed an error in even sustaining in part the motion for summary judgment for the reason that the motion for summary judgment presented a question of fact which the court could not pass upon on affidavits to the exclusion of the jury.

2. The court erred in sustaining in part the appellee's motion for summary judgment for the reason that the easement merely granted to the appellee the right to fluctuate the stream as it flowed through the appellants' property, not to flood the lands, and in any event did not permit the flooding of appellants' lands except as the water flooded from the channel as it passed through appellants' property.

3. The court erred in imposing upon the appellant the burden of proving the existence of the easement and that it had been violated by the appellee, whereas the appellee had pleaded the original easements an affirmative defense and the burden was on the appellee to prove its affirmative defense.

4. The court erred in directing the jury to return a verdict in favor of appellee and against appellants when the plaintiffs had made out a prima facie case of liability on the part of the appellee.

5. The court erred in holding that the alleged easement and release was valid and authorized the flooding of the appellants' lands with impunity by the appellee.

POINTS AND AUTHORITIES

1. On motion for summary judgment if there is an issue of fact presented summary judgment will not be granted.

Hoff v. St. Mercury Indemnity Co., 74 Fed. 2d 689.

2. Possession of land by vendee is sufficient notice to put others on inquiry as to his rights.

8 Thompson on Real Property Permanent Edition,
Page 424, Section 4521;

55 Am. Jur. 1087, Section 712;

Simmons Creek Coal Co. v. Doran, 143 U.S. 417, 35
L.Ed. 1063, 12 S. Ct. 239;

Kirby v. Talmadge, 160 U.S. 379, 40 L. Ed. 463, 16
S. Ct. 349.

3. Contracts whereby servitudes are created are designed to confer rights, impose obligations which otherwise would have no existence and are strictly construed.

28 C.J.S. 753 Sec. 75;

Shaffer v. State National Bank, 37 L. Ann. 242;

Dickson v. Arkansas Louisiana Gas Co., 193 So. 246.

4. Where an easement is created by special grant or reservation the extent of the right acquired depends not upon user but upon terms of the grant or reservation properly construed and the servient estate will not be burdened to a greater extent than was contemplated or intended at the time of the creation of the easement.

28 C.J.S. 752, Section 75;

Westcoast Power Co. v. Buttram, 31 P. 2d 687, 54
Ida. 318;

Fendall v. Miller, 196 P. 381, 99 Ore. 610;

Dyer v. Compere, 73 P. 2d 1356, 41 N. Mex. 716.

5. Where the grant or reservation is specific in its terms it is decisive of the limits of the easement.

28 C.J.S. Page 753, Sec. 75;

Dyer v. Compere, 73 P. 2d. 1356, 41 N. Mex. 716;

Henry v. Tenn. Elec. Power Co., 5 Tenn. App. 205;

Fendall v. Miller, 196 P. 381, 99 Ore. 610.

6. Whenever anyone creates an obstruction to the natural flow of water a person whose property is injured thereby has a good cause of action.

Fischer v. Davis, 113 P. 910, 116 P 412 19 Ida. 493;

Hall v. Washington Water Power Co., 149 P. 507, 27 Ida. 437;

Thies v. Platte Valley Public Power & Irrig. Dist., 289 N.W. 386, 137 Neb. 344;

Chandler v. Drainage Dist. No. 2 of Boundary Co., 187 P. 2d 971, 68 Ida. 42;

Scott v. Watkins, 122 P. 2d 220, 63 Ida. 506.

7. And where damages occur from defendant's negligence or act and an act of God as concurring causes, the defendant is liable to same extent as though damages had been caused by his negligence alone.

Inland Power & Light Co. v. Grieger, 91 Fed. 2d 811, (9th C. CA.)

8. The right to an easement as a defense must be specially pleaded.

28 C.J.S. Page 734, Section 67;

Dunier v. Rutland Ry. Lt. & Power Co., 110 Atl. 4, 94 Vt. 187;

8(c) Fed. Rules of Civil Procedure.

9. When a party justifies his act under an easement the burden is upon him not only to prove the easement but also to prove that the things done comes within the terms of the easement. This is especially true where the grant is conditional.

Jackson v. Harrington, 2 Allen Rpts. 242;

Swenson v. Marino, 29 N.E. 2d. 15; 306 Mass. 582; 130 A.L.R. 763;

Wigmore on Evidence 3rd Edition, Vol 9, Page 496
Sec. 2537.

31 C.J.S. Page 709 Sec. 104;

Harmon v. Adams, 120 U.S. 363, 30 L. Ed. 683; 7
S. Ct. 553;

Griffin v. Bartlett, 55 N.H. 119;

Dutton v. Stoughton, 65 Atl. 91, 79 Vt. 361;

Davis v. Louisville & N. R. Co., 244 S.W. 483, 147
Tenn. 1;

Morris v. Commander, 55 N.C. 510;

Fortier v. H. P. Hood & Sons, 30 N.E. 2d 253, 307
Mass. 292;

Roediger v. Cullen, 175 P. 2d 669, 26 Wash. 2d 690;

Goldstein v. Beal, 59 N.E. 2d 712, 317 Mass. 750;

Lambert v. Rodier, 194 S.W. 2d 934 (Mo.);

Coughran v. Nunez, 127 S.W. 2d 885 (Tex.);

10. The rule is that the burden of proof constitutes a substantial right of the party on whose adversary the burden rests, and that this right should therefore be jealously guarded, and rigidly enforced by the court, and the court has no right to take the burden of proof from the shoulders of one party and shift it to another.

22 C.J. Page 70;

31 C.J.S. Page 709, Sec. 104;

Fisher v. Jackson, 216 N.C. 302, 4 S.E. 2d 847;

Boswell v. Pannell, 107 Tex. 433, 180 S.W. 593.

11. The burden of proof as to a fact or issue generally rests upon a party pleading it or having the affirmative of the issue and remains on that party throughout the trial.

31 C.J.S. Page 709, Section 104;

Reliance Life Insurance Co. v. Burgess, 112 Fed.
2d 234;

Certiorari denied, 61 S. Ct. 137;

Rehearing denied, 61 S. Ct. 391.

SPECIFICATIONS OF ERROR OR POINTS RELIED ON

1. The court erred in sustaining defendant's motion for a summary judgment to the effect that the defendant had an easement permitting it to flood plaintiffs' land.

2. The court erred in ruling that plaintiff must prove that defendant had abused its easement permitting it to flood plaintiffs' land before plaintiff could recover against the defendant.

3. The court erred in directing the jury to return a verdict in favor of the defendant and against the plaintiff.

4. The court erred in entering judgment against the plaintiff and in favor of the defendant no cause of action, and in awarding defendant its costs. (R. 147)

ARGUMENT

I

THE APPELLANTS CONTEND THAT THE COURT COMMITTED ERROR EVEN IN SUSTAINING IN PART THE MOTION FOR SUMMARY JUDGMENT FOR THE REASON THAT MOTION FOR SUMMARY JUDGMENT PRESENTED A QUESTION OF FACT WHICH THE COURT COULD NOT PASS UPON AFFIDAVITS TO THE EXCLUSION OF THE JURY.

In opposition to appellee's motion for summary judgment the appellants filed the affidavit of Edward Griffeth in which it set forth that prior to the execution of the release and easement by George Thomas etux, Edward Griffeth was in possession and occupancy of the property under contract to purchase and that he did not know of nor consent to the execution of the said release and easement.

This put the appellee on notice as to the right of said Edward Griffeth and it took subject thereto. Thus there

was presented the issue of fact as to whether or not appellants' property was ever subject to the easement.

8 Thompson on Real Property Permanent Edition,
Page 424, Section 4521;

55 Am. Jur. 1087, Section 712;

Simmons Creek Coal Co. v. Doran, 143 U.S. 417,
35 L. Ed. 1063, 12 S. Ct. 239;

Kirby v. Talmadge, 160 U.S. 379, 40 L. Ed. 463,
16 S. Ct. 349.

A question of fact being presented, the court could not decide the issue to the exclusion of the jury.

Hoff v. St. Mercury Indemnity Co., 74 Fed. 2d 689.

II

THE COURT ERRED IN SUSTAINING IN PART THE APPELLEE'S MOTION FOR SUMMARY JUDGMENT FOR THE REASON THAT THE EASEMENT MERELY GRANTED TO THE APPELLEE THE RIGHT TO FLUCTUATE THE STREAM AS IT FLOWED THROUGH THE APPELLANTS' PROPERTY, NOT TO FLOOD THE LANDS, AND IN ANY EVENT DID NOT PERMIT THE FLOODING OF APPELLANTS' LANDS EXCEPT AS THE WATER FLOODED FROM THE CHANNEL AS IT PASSED THROUGH APPELLANTS' PROPERTY.

Paragraph 2 of the Release and Easement releases appellee from damages to the lands in question occurring prior to December 22, 1926, "caused by flooding or by the impounding or storage of water or waters of Bear River or by fluctuation of the flow of said river or by depositing ice thereon or otherwise."

Paragraph 3 contains the easement, the granting clause, and paragraph 4 sets forth a release for damages resulting from future flooding or depositing of ice. This release is personal and not binding on the appellants.

The grant in paragraph 3 said:

"And for said consideration above made grantors

and successors and assigns hereby grant unto said Utah Power & Light Co., its successors and assigns, an easement for and the right to continue as aforesaid, the manipulation and fluctuation of the flow of the said river as it passes in its natural channel through or along the lands owned, claimed or possessed by the grantors.”

The appellants believe that had the appellee bargained with their predecessor in interest for an easement to flood their lands—such a right would have been set forth in the granting clause. The release of prior damages covered flooding and depositing of ice, thus if it had been the intent to grant an easement to flood or deposit ice why did not the grant set forth such right? (The Release and Easement is set forth at page 4 of this brief.)

The foregoing granting clause is definite and specific in its terms and limits the appellee to the “right to continue as aforesaid the manipulations and fluctuation of the flow of the said river as it passes in its natural channel through or along the land”. Had it been the intent of the grantors to grant an easement to flood the land or deposit ice thereon the grantors would have set forth such a right in the granting clause. The terms of the release, in paragraph 2, reflect that the appellee bargained for and received a release for prior damages caused by flooding, impounding or storage of water and fluctuation of the stream or depositing of ice, whereas the easement and granting clause establishes that all the appellee bargained for by way of an easement was the right to fluctuate the water as it passed through the appellants’ land.

Contracts creating easements are strictly construed.

28 C.J.S. 753, Sec. 75;

Shaffer v. State National Bank, 37 L. Ann. 242;

Dickson v. Arkansas Louisiana R. Co., 193 So. 246.

And where the easement is definite and specific in its terms it is decisive as to the limitation of the easement.

28 C.J.S. 753, Sec. 75;

Dyer v. Compere, 73 P. 2d 1356, 41 N. Mex. 716;

Henry v. Tenn. Elec. Power Co., 5 Tenn. App. 205;

Fendall v. Miller, 196 P. 381, 99 Ore. 610.

The complaint further showed that the lands of the appellants were flooded by water leaving the banks of the river at a point about 40 rods from the property line of the appellants. The lands were not flooded by the water leaving the banks as it flowed through the appellants' lands, and the appellants contend that even assuming that the grant gave the appellee the right to flood appellants' lands, which appellants deny, nevertheless it was never within contemplation of the parties at the time of the execution of the purported easement that it would protect the appellee in flooding appellants' lands when such flooding was occasioned by the overflow of the banks of the river upstream from appellants' lands and the passing of water over other lands on to the appellants' lands.

The law is definite that a servient estate will not be burdened to a greater extent than was contemplated or intended at the time of the creation of the easement.

28 C.J.S. 752, Sec. 75;

Westcoast Power Co. v. Buttram, 31 P. 2d 687, 54
Ida. 318;

Fendall v. Miller, 196 P. 381, 99 Ore. 610;

Dyer v. Compere, 73 P. 2d 1356, 41 N. Mex. 716.

However, it should be borne in mind that at all times in consideration of this alleged easement that it was not introduced in evidence, and as we shall attempt to demonstrate later, that the duty was on the appellee to introduce it in evidence and bring it before the court. This discussion, therefore, is confined to a consideration of the motion for summary judgment.

III

THE COURT ERRED IN DIRECTING THE JURY TO RETURN A VERDICT IN FAVOR OF THE APPELLEE AND AGAINST THE APPELLANTS AS THE APPELLANTS HAD MADE OUT A CASE SUFFICIENT FOR THE JURY.

In considering a motion for a directed verdict the court will consider the evidence in its more favorable light to the appellants with every inference of fact that might be drawn from it.

Inland Power & Light Co. v. Grieger, 91 Fed. 2d 811,
9th C. Ct.

The appellants' evidence established that since appellee built its dam at Oneida, Idaho, in about 1914, it had regulated the flow of the water passing down Bear River from this point, and as it passed through appellants' lands; that all of the water flowing down Bear River from Oneida had to pass either over or under the dam and that the dam was situated about 14 miles north of appellants' property; that several days before flooding of appellants' land and up to and including the 7th day of January, 1949, appellee had released more water over the dam than flowed into the river from the river's natural watershed; that the appellants' lands had never been flooded until they were flooded in January, 1949; that prior to the building of appellee's dam at Oneida the water of Bear River flowed uncontrolled in its natural channel, and during the winter months the river would freeze over and the water would flow under the ice, never overflowing its banks, however, after the dam was built and the appellee started to regulate the flow of the river and this condition no longer resulted. As in the morning it would send limited or small amounts of water from the dam at Oneida, followed in the afternoon by large amounts of water; that in the winter months when small amounts of water were sent down the river it would freeze

over and then in the evening when large amounts of water were sent down the river it would cause the ice already formed to break up and this ice would settle at the bottom of the stream and other ice would be deposited in the same; that this ice would then break loose, causing ice jams to form in the river channel; that this condition happened for several years prior to the time the appellants' lands were flooded. Appellee was fluctuating the stream during December 1948 and January 1949. Appellants' evidence further shows that a few days prior to the 7th of January, 1949, when their lands were flooded the water was being backed up and was flooding over the south end of appellants' property; that upon noticing this Melvin Griffeth, one of the appellants, called the manager of Utah Power & Light Company at Preston, telling him of this situation and advising him that unless something was done the appellants' lands would be flooded. Appellants' evidence also showed that the ice jams were forming south of their property and that water was being backed up and flooding over the road at the Preston Dayton Bridge, the bridge is about two miles south of appellants' lands. This flooding came to the attention of Mr. Smart, the maintenance foreman of the State Highway Department. He called the appellee at its station at Oneida Dam, telling them that the water was backing up, flooding the road and that unless something was done he was afraid it would wash out the bridge. It was a cold winter and the appellee knew it as it kept a daily temperature record. On the 7th day of January, 1949, an ice jam occurred north of appellants' lands, diverting the water from the channel over lands north of appellants' lands and then from these lands upon the lands of the appellants; the flood was several feet in depth and was spread out over an area of about 80 rods.

In the absence of an easement or some contractual

exemption from liability on the part of the appellee under the Idaho Law, this showed a case for the jury at least and would have sustained a verdict in favor of appellants. There are numerous Idaho cases that hold to the effect that

“there is no question that a person cannot build a dam, imbankment or other artificial means, obstruct the natural flow of water in a stream and cause it to overflow or to run upon a riparian owner’s land.”

Chandler v. Drainage District No. 2 of Boundary County, 187 P. 2d 971, 68 Ida. 42.

Scott v. Watkins, 122 P. 2d 220, 63 Ida. 506;

Fisher v. Davis, 113 P. 910, 116 P. 412, 19 Ida. 493;

Hall v. Washington Water Power Co., 149 P. 507,
27 Ida. 437;

See also Thies v. Platte Vy. Pub. Power & Irrigation
Dist. 289 N.W. 386, 137 Neb. 344.

We specifically invite the courts to a consideration of the Thies v. Platte Valley Public Power & Irrigation District case supra where the facts of that case were not as strong as the evidence in this case and yet the learned Supreme Court of Nebraska affirmed the judgment in favor of the land owners and against the power district.

Under the law the power company is liable if it causes the water to overflow the land owners’ land. We have established this fact, at least sufficient to make the question for the jury.

Then we submit that we were entitled to go to the jury because up to this point there was nothing before the jury with respect to the alleged easement or release and having presented facts sufficient to establish a case, then we inquire why were we not entitled to have it submitted to the jury? And the only reason that the learned trial judge gave us was that he had put the burden of proof on the plaintiff to prove the affirmative defense of the

defendant; a thing which he had no right to do. He did say finally, when he was more or less cornered on his unsound position, that we had not proved a case even without regard to the easement and we contend in this respect he is equally wrong as he is in his position that the burden of proof was on the plaintiff to disprove an affirmative defense of the defendant before the defendant had offered any evidence on it. Within the Idaho law, we had established a case and we believe that the record would sustain us in the position even if it were necessary that we established the negligence of the appellee. This is certainly true under the holding of this honorable court in the case of *Inland Power & Light Co. v. Grieger*, 91 Fed. 2d 811. Certainly within the Idaho authorities all that needs to be shown is to establish a case that the riparian owners' lands were overflowed by reason of the acts of the defendant.

IV

THE COURT ERRED IN IMPOSING UPON APPELLANTS THE BURDEN OF PROVING THE EXISTENCE OF THE EASEMENT AND THAT IT HAD BEEN VIOLATED BY THE APPELLEE, WHEREAS THE APPELLEE HAD PLEADED THE ORIGINAL EASEMENT AS AN AFFIRMATIVE DEFENSE AND THE BURDEN WAS ON THE APPELLEE TO PROVE ITS AFFIRMATIVE DEFENSE.

We pass now to a consideration of where the burden of proof lies to establish the right of appellees to overflow appellants' lands. The most that can be said of the purported easement, if any, is that it is conditional and where a party attempts to justify his act under an easement and particularly a conditional easement the burden is upon him not only to prove the easement but also to prove that the things done would come within its terms. If the easement gave appellee the right to flood appellants' lands, which appellants deny, it was not a general right by conditional, as it said.

“And for said consideration any damages that may result from future flooding or depositing of ice on said land caused by the fluctuation of the flow of said river in the normal operation of Grantee’s plant or plants, up stream from Grantor’s land, are hereby waived and released, provided future fluctuations shall not exceed those heretofore occurring in the operation of said Oneida Plant.”

The Supreme Judicial Court of Massachusetts had before it the construction and application of a conditional easement in the case of *Jackson v. Harrington*, 2 Allen Reports, 242. The deed contains the following clause:

“Also the ground of the dam belonging to the said mills with the usual reservations usually made by the original proprietors for mill or mills, pond or ponds, for the exercise of which rights reference is to be had to the former deeds hereabouts, with liberty to flow or pond near such mills so much land as is necessary and convenient for the benefit of said mills agreeably to the original proprietors in such conveyance, and not otherwise.”

The Supreme Judicial Court of Massachusetts held with respect to the matter of burden of proof in the case now being analyzed as follows:

“The jury were rightly instructed that, under the pleadings in this case, the burden was on respondent to prove that he had a right to flow the complainant’s land without making compensation, as high as he had flowed it.” *Jackson v. Harrington supra*.

We invite the court’s consideration to this well considered opinion. This case was decided in 1861 but Massachusetts courts have never receded from the position there taken, but have re-affirmed it down to date.”

See *Swenson v. Marino*, 29 N.E. 2d 15, 306 Mass. 582, 130 ALR 763;

The Supreme Court of the United States in a case involving the burden of proof under conditional release held that not only the burden of proof of establishing a release was upon the proponent thereof but that it also had to establish that it had performed the conditions.

Harmon v. Adams, 120 U.S. 363, 30 L. Ed. 683, 7 S. Ct. 553.

The foregoing decisions are in line with the general rule that the burden of proof of a fact or issue generally rests upon the party pleading it or having the affirmative of the issue and remains with that party throughout the trial.

31 C.J.S. 709, Sec. 104;

Wigmore on Evidence 3rd Edition Vol. 9, P. 496, Sec. 2537.

We particularly invite the court's attention to a decision from the 8th Ct. The Reliance Life Insurance Co. v. Burgess, 112 Fed. 2d 234.

Cert. Denied 61 S. Ct. 137;

Rehearing Denied 61 S. Ct. 391.

It is disclosed by the record in this case that the learned trial judge, contrary to all precedent that had gone before, lifted the burden of proof from the obligations of the appellee and placed it upon the appellants. This we submit the court had no power to do and in this connection we will ask the indulgence of the court to cite the following authorities.

22 C.J. Page 70;

31 C.J.S. Page 709, Sec. 104.

It has been well said by the Supreme Court of North Carolina:

“The rule as to the burden of proof is important and indispensable in the administration of justice.

It constitutes a substantial right of the party upon whose adversary the burden rests, and therefore should be carefully guarded and rigidly enforced by the courts. *State v. Faulconer*, 182 N.C. 793, 798, 108 S.E. 756, 17 A.L.R. 986 and cases there cited.”

Fisher v. Jackson, 216 N.C. 302, 4 S.E. 2d 847.

The Supreme Court of Texas in a well considered case said :

“The burden of proof never shifts from plaintiff to defendant, but is upon the plaintiff throughout the trial to establish by preponderance of the evidence the affirmative of the issue or issues upon which he relies for recovery. It is an old and well settled rule that the burden of proof rests upon the plaintiff to establish his case by a preponderance of the evidence. It has been so long in use that many consider it a mere formality, but it is not so. It is no idle ceremony, but its office is important and indeed indispensable, in the administration of justice. It should be jealously guarded by the courts for a trial without it would in many instances be a mockery, and in all instances unfair resulting often in a miscarriage of justice. But it is one of those rules which operate equally for the plaintiff and defendant; that is, the burden is on the plaintiff to establish by a preponderance of evidence the issues upon which he relies for recovery and likewise it is upon the defendant to establish his defenses to the plaintiffs’ alleged cause of action by a preponderance of the evidence. So that, when the court charges the jury, he should apply the rule to the plaintiff’s alleged cause of action, and then apply it also to the defendants’ defense or defenses. These rules of practice are familiar to all, and require no citation of authority.”

Boswell v. Pannell, 107 Tex. 433, 180 S.W. 593.

The court in the trial of this case violated these salutary rules of law that have marked the course to be pursued

by litigants since time immemorial and refused to permit the appellants to go to the jury unless they had shouldered the appellee's burden with respect to the appellee's affirmative defense. This we submit was error on the part of the learned trial court and we defy counsel for appellee to sustain the rule of the trial court in transferring the burden of proof from the appellants to the appellee with respect to affirmative defenses.

V

THE COURT ERRED IN HOLDING THAT THE ALLEGED RELEASE AND EASEMENT WAS VALID AND AUTHORIZED THE FLOODING OF APPELLANTS' LAND.

In this respect we would like to make our position clear that in discussing this matter we do not concede that the appellee had a right to flood appellants' land as the easement gave it only the right to fluctuate the water as it passed through appellants' lands, however should the court construe the easement otherwise we contend that under the facts of this case it nevertheless offers the appellee no protection as the most favorable interpretation to appellee would limit flooding or depositing of ice, only so long as such results from flooding originating within the boundaries of appellants' land. The easement would afford no protection for flooding originating without the lands of the appellant. In this case the facts were, that the flood originated from the river channel from lands lying north of appellants' property. We will not burden the court further in arguing this proposition, having argued it under Argument II, (page 21) which we beg leave to refer the court to.

In conclusion, we believe that the appellants have been denied a right to submit their case to a jury of their peers

and that the erroneous decision of the learned trial court to the contract should be reversed and the cause remanded with directions to submit the matter to a jury, for which the foregoing is

Most respectfully submitted,

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No. 13611

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MELVIN GRIFFETH and LOIS D. GRIFFETH,

Appellants,

vs.

UTAH POWER & LIGHT COMPANY, a Corporation,

Appellee.

Brief of Appellee

Appeal from the United States District Court for
the District of Idaho
Eastern Division

HONORABLE CHASE A. CLARK, *Judge*

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FILED

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PAUL P. O'BRIEN

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Appellee.

Brief of Appellee

SUMMARY OF FACTS

Appellants claim that appellee negligently flooded their lands and certain personal property located thereon. By their complaint and amended complaint they seek recovery for damages.

Appellee interposed a motion for summary judgment supported by affidavits. Appellants filed affidavits in opposition but did not deny or put in issue any of the facts set forth in the affidavit supporting appellee's motion. The motion was argued orally and then submitted to the trial court upon written briefs.

The trial court ruled that the flood easement presented and relied upon by appellee was a valid and subsisting easement, and that appellants were bound thereby. The trial court further ruled, in effect, that appellee had made prima facie proof that the things done by it were within the terms of the easement. He reserved for the trial an opportunity for appellants to overcome appellee's prima facie proof, and to prove, if they could, that appellee had abused the rights conferred by the easement (R. 47, 61, 62, 63, 140, 141, 142).

Before the trial began the court announced again his ruling upon the motion for summary judgment and ruled that the appellants would have the burden of proving that in the operation of its business appellee had "abused" the rights granted by the easement (R. 61, 62, 63, 140, 141, 142).

At the close of appellants' case appellee moved for a directed verdict, which motion was granted.

POINTS AND AUTHORITIES

I.

There was no genuine issue of fact before the court on appellee's motion for summary judgment. The facts being uncontradicted, the granting of the motion was required by Rule 56, Federal Rules of Procedure.

Sartor v. Arkansas Natural Gas Corp.,
134 F. 2d 433, 435;

Christianson v. Gaines,
174 F. 2d 534;

Lindsey v. Leavy,
149 F. 2d 899, 902;

Koepke v. Fontecchio,
177 F. 2d 125, 127.

I-A

This court has construed an easement similar to the one under review favorably to appellee's contention.

Luama v. Bunker Hill & Sullivan Mining Co.,
41 F. 2d 358.

I-B

The belated effort of appellants to prove an ancient contract covering and the ancient possession of property covered by easement is condemned by the doctrine of laches.

30 C. J. S., Sec. 119, pp. 542, 543;

Gillons v. Shell Co. of California,
86 F. 2d 600, 609;

The Kermit-Lamborn v. American Ship. etc.,
76 F. 2d 363;

Gifford v. Travelers Protective Assn.,
153 F. 2d 209;

Harris Stanley Coal & Land Co. v. Chesapeake &
Ohio R. R. Co.,
154 F. 2d 450, 455;

Barron & Holtzoff, Federal Practice and Pro-
cedure, Vol 3, Sec. 1245, p. 125.

II.

The record contains no substantial probative evidence that appellee was guilty of any negligence causing or contributing to the injury complained of.

III.

Appellants' points not sustained by record.

ARGUMENT

I.

PARTIAL GRANTING OF SUMMARY JUDGMENT
FULLY JUSTIFIED BY RECORD

On and prior to December 22, 1926, Mr. George Thomas was the owner of the land described in plaintiffs' original complaint. Upon that day he and his wife executed the flood easement involved herein. Because the effect of the easement raises a major point for review and decision, we set it forth here for the convenience of the Court.

“Inst. No. 27690 RELEASE AND EASEMENT
“This agreement made and entered into this 22 day
of December, 1926, by and between UTAH POWER
& LIGHT COMPANY, hereinafter referred to as
'Grantee,' and GEORGE THOMAS and ANNA E.
THOMAS, his wife, hereinafter called 'Grantors,'
WITNESSETH:

“That for a valuable consideration, the receipt of which

is hereby acknowledged, the Grantors above named hereby release and discharge the Utah Power & Light Company, its successors and assigns, from any and all claims for damages to the lands, crops, or other property of the Grantors heretofore caused by flooding or by the impounding or storage of the waters of Bear River, or by the fluctuation of the flow of said river, or by deposit of ice thereon, or otherwise, and/or due to the maintenance or operation of Grantee's Oneida Power Plant or other plants operated by said Grantee on said Bear River;

“And for said consideration, above named Grantors, their successors and assigns, hereby grant unto said Utah Power & Light Company, its successors and assigns, an easement for the right to continue as aforesaid the manipulation and fluctuation of the flow of said river as it passes in its natural channel through or along the lands owned, claimed or possessed by the Grantors, located in Section 17, Township 15 South, Range 39 East, B.B. & M., particularly including, but not limited to, the following land, to-wit:

“The Southeast Quarter of the Northwest Quarter, the East half of the Southwest Quarter and the Southwest Quarter of the Southwest Quarter of Section 17, Township 15 South, Range 39 East B.B. & M., excepting approximately 10 acres heretofore transferred to the Riverview Sanitarium Company, containing 150 acres, more or less.

“And for said consideration any damages that may result from future flooding or depositing of ice on said land caused by the fluctuation of the flow of said river in the normal operation of Grantee's plant or plants, up stream from Grantor's land, are hereby waived and released, provided future fluctuations shall not exceed those heretofore occurring in the operation of said Oneida Plant.

“In WITNESS WHEREOF, the parties have hereunto

set their hands this 22 day of December, 1926.

Witness

Flora Eliason

George Thomas

Anna E. Thomas."

(Duly acknowledged)

The foregoing easement, together with supporting affidavits, was brought before the court on motion for summary judgment. By the motion for summary judgment and supporting affidavits, appellee assumed and discharged the burden of showing that it owned and possessed the easement pleaded in its answer and that the things done by it in reliance upon the easement were done within the terms of the easement. Having made such proof, the burden then came to rest upon appellants to prove negligence of appellee causing or contributing to their injury. In *re Blank's Estate*, 11 N.Y.S. 2d 1002. After the Court had ruled upon the motion and the trial was about to commence upon the issue whether there had been any negligent exercise of the rights conferred by the easement, appellants asked leave to amend their complaint, *inter alia*, by including additional land as the basis for recovering additional damages.

Appellee objected to the amendment upon the ground that the lands sought to be brought into the case by amendment were, like the land described in the original complaint, subject to flood easement and that appellee should be accorded the right to direct a motion for summary judgment to the additional land. Thereupon the following occurred—

"The Court: Do I understand you to say that this new land they are including in the amendment, that

you also have the same easement?

Mr. Ray: We don't have an abstract of title but we have an easement as to this land.

The Court: Will counsel for the plaintiff admit that they have such easement?

Mr. Anderson: It is my understanding." (R 61)

The foregoing took place in open court and would seem to be a significant admission of the existence of the flood easements relied upon by appellee.

That the easement set forth above was executed and delivered to appellee by George Thomas and his wife was never denied. It was placed of record in the office of the County Recorder of Franklin County, Idaho, on January 12, 1927 (R. 33), and ever since that time has been a matter of public record. In as much as the easement stood of record, subsequent purchasers took with constructive knowledge of the easement. (Idaho Code Sec. 55-811).

The land covered by the easement was conveyed by George Thomas and wife to Edward T. Griffeth by deed dated August 6, 1935, and recorded March 15, 1941. When Edward Griffeth accepted the deed, the easement here under review had been of record for more than eight years. Edward T. Griffeth and wife thereafter conveyed the property to appellants by deed dated September 19, 1946, and recorded September 27, 1946 (R. 33, R. 34). When appellants accepted deed to the land in September of 1946, the easement had been of record for more than nineteen years.

It was held by the Ohio Court in *Kyle v. Thompson Admr.*, 11 Ohio State 616, that a purchaser must look to the state of the recorded title as of the time he completes his purchase, not as of the time he entered into a contract to purchase. Neither the appellants nor their predecessor Edward T. Griffeth can be heard to say that when they took their respective deeds to the property they were without knowledge of the easement. They accepted the deeds knowing that the grantors' titles were subject to the easement and thereby acquired title subject to the easements (Idaho Code, Sec. 55-811).

The Motion for Summary Judgment was supported by the affidavit of J. A. Hale. By his affidavit, it is shown that Hale was employed by appellee in 1913 as a civil engineer; that he had personal knowledge of and personal connection with the construction of the Oneida power dam, referred to in plaintiffs' complaint and by plaintiffs' witnesses, during the years 1913 to 1920, and has had personal knowledge of the operation of the dam at all times since its completion.

Hale deposed that George Thomas was the owner of the land covered by plaintiffs' original complaint and by the easement set forth above, on and prior to December 22, 1926. Prior to that date Thomas made a claim against appellee for the flooding and the icing of the land. Thomas' claim was compromised and settled by the granting and purchasing of the easement.

Finally, Hale deposed of his own knowledge that during the months of December 1948 and January 1949, the period complained of by appellants, the Oneida plant "was operated

normally and in the same manner in which it was operated prior to December 22, 1926" (R. 32). In his affidavit Hale set forth his schooling, training and experience to qualify him to make the statements later set forth in his affidavit. The facts set forth in Hale's affidavit have never been challenged or controverted.

Appellee, having shown without contradiction that it held a valid and subsisting easement, the interpretation of the easement was for the court, and having shown that its operation of the power plant during the times involved was within the only restrictive requirements in the easement, there was no genuine issue of fact and the case was one for disposition under Rule 56.

The following are typical cases reflecting the views of the courts upon Rule 56.

In *Sartor v. Ark. Natural Gas Corp.*, 134 F. 2d 433, 435, the Circuit Court of Appeals for the Fifth Circuit said:

"We have written often on the nature and effect of Rule 56, Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, the rule for summary judgment. Our views, as there expressed, leave in no doubt that the summary judgment rule is a salutary one for the purpose of avoiding unnecessary trials, that is, trials where there is nothing of fact to be tried."

Christianson v. Gaines, 174 F. 2d 534, was decided by the Court of Appeals for the District of Columbia. It is there said in part:

"Rule 56, Federal Rules of Civil Procedure, 28

U.S.C.A., is utilized by litigants to secure justice without unnecessary expense and unnecessary delay. It imposes a duty upon the court to sift the issues in the case and to determine which material facts are really at issue and which are not, thereby facilitating and expediting the trial. This pre-trial sifting is quite similar to the pre-trial procedure provided in Rule 16, except that under Rule 56 (d) it is compulsory while under Rule 16 it is discretionary with the court. Rule 8 (a) of the Federal Rules, as amended, provides that 'a pleading which sets forth a claim for relief * * * shall contain * * * (2) a short and plain statement of the claim showing that the pleader is entitled to relief * * *.' Reading Rule 56 and Rule 8 (a) together, it was the duty of the court to determine whether or not there was a genuine issue of fact in controversy. If so, the parties were entitled to trial and, if not, summary judgment was proper. See 3 Moore, Federal Practice Sec. 56.01 (1938)."

After making the foregoing statement the District of Columbia Court of Appeals quoted with approval the following significant language from the Ninth Circuit Court of Appeals, in *Lindsey v. Leavy*, 149 F. 2d 899, 902:

"The sufficiency of the allegations of a complaint do not determine the motion for summary judgment. Cases dealing with and construing Rule 56, Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, clearly indicate to the contrary and if this were not the case, Rule 56 would be a nullity for it would merely duplicate the motion to dismiss.'"

The foregoing is especially pertinent here because it squarely meets appellants' contention that paragraph VI of their complaint defeats the application of Rule 56.

See also, *Koepke v. Fontecchio*, 177 F. 2d 125, 127, wherein the Eighth Circuit Court of Appeals observed that:

“The purpose of the procedural rule 56, Federal Rules of Civil Procedure, 28 U.S.C.A., providing for the rendering of summary judgment is to dispose of cases where there is no genuine issue of fact even though an issue may be raised formally by the pleadings. In the instant case there was no dispute as to the character of the premises nor the use that was being made of them by appellee. Neither was there any doubt as to when the premises assumed their present character. The court fixed the date from the undisputed evidence as October 1, 1947. We think there was no genuine issue as to any material facts and hence the record presented a proper case so far as procedure is concerned for the filing of a motion for summary judgment.”

The construction of the contract is for the court and, if we have been correctly taught upon the subject, the court will, in the process of construction, place itself as nearly as can be in the situation of the parties at the time of the execution of the agreement so as to arrive at the purpose and intent of the parties.

An inspection of the easement reveals the situation of the parties and the background against which they dealt. Prior to December 22, 1926 the water of Bear River had left its channel and flooded the lands of Thomas. He claimed that the flooding resulted from fluctuation of the river due to the operation by defendant of its Oneida power plant upstream from the Thomas lands. He asserted a claim for damages, and the easement expresses the agreement of the parties by which that claim was settled.

By the language of the second paragraph of the easement, Thomas acknowledged receipt of payment, and in consideration therefor released defendant from all claims for damages "heretofore caused by flooding." There can be no doubt that Thomas' lands had been flooded. Flooding, and consequent damage, and the prospect of future flooding, was the subject matter with respect to which the parties were agreeing.

By paragraph 3 of the easement, Thomas granted to defendant the right to continue "as aforesaid the manipulation and fluctuation of the flow of the river as it passes in its natural channel through or along lands claimed or owned by grantors." Appellants would lift the foregoing phrase from context and seize upon it as showing that the easement granted only the right to fluctuate water within the confines of the channel. It is a well recognized rule of law that parties to a contract will not be held to have contracted for an idle or useless thing, and that an interpretation or construction will be favored which is reasonable as opposed to one which is absurd.

As long as the river remains within its banks there can be no flooding, and therefore no damage. The parties were contracting with respect to flooding, and it would have been an idle and useless thing for Thomas to attempt to sell, and for the defendant to buy, the right to permit water to pass down the natural channel of the stream. The significant words in paragraph 3 are "as aforesaid." The right was granted to manipulate and fluctuate the stream at the power plant "as aforesaid," which means that defendant acquired the right to fluctuate the flow as it had done prior to the date of the ease-

ment. Previously the stream had flooded the Thomas land only because it left the natural channel. Thomas claimed that fluctuation "as aforesaid" had resulted in the flooding of his land, and he granted to the defendant the right to "fluctuate as aforesaid."

The last paragraph of the easement leaves it perfectly plain that for the consideration paid him, Thomas waived and released defendant from any and all damages which in the future might result from the flooding of the lands by reason of the normal operation of the power plant, provided future fluctuations of stream flow at the power plant should not exceed those heretofore occurring in the operation of the plant.

One fact which clearly confronted the parties to the agreement was that the land had been flooded. Another fact was that such flooding might recur from time to time. The subject matter of their dealings was a flood which had occurred, and floods which might occur in the future. Of course, they were not concerned with water which remained harmlessly within the channel. For the consideration paid Thomas he charged the land involved with the burden of receiving flood waters from the Bear River. That a flood might occur in the future was clearly within the contemplation of the parties, and it was the expressed intention of the parties that any damages which might result from such future flooding would be and was paid for in advance by defendant. Such payment was made and acknowledged by Thomas.

The only limitation upon the effectiveness of the easement granted was that any future flooding should not result

from fluctuations of stream flow *at the Oneida power plant* exceeding "those heretofore occurring in the operation of the Oneida plant." This is clear recognition that while defendant might control the fluctuation of the flow at its plant, it did not control forces which might operate downstream from the power plant.

What were the facts before the Court on the question whether the stream fluctuation on January 7, 1949, exceeded fluctuations "heretofore occurring?"

In Paragraph 6 of the plaintiffs' complaint it is alleged in effect that the banks of the river near plaintiffs' land were unable to confine the amount of water discharged into the stream by defendant. There is no allegation that the fluctuation of flow at the plant exceeded the fluctuations "heretofore occurring." Once before, prior to December 22, 1926, the water got out of its banks and onto the Thomas lands, and it was agreed by the parties that such might happen again. It did happen in 1949, twenty-six years later, but the land was then subject to the burden of the easement. Any damage from such flooding had been anticipated in 1926, and paid for in advance by the consideration acknowledged in the easement.

By the affidavit of J. A. Hale, his close identification with the engineering problems of the defendant, including the construction and operation of the Oneida plant, is shown. All through the years Hale has been personally familiar with the operation of the Oneida plant, from the construction of the plant, without interruption, to and including the present time. And he proves without dispute that the operation of the plant at the time complained of in plaintiffs' complaint

was normal operation, and that the fluctuation of the stream flow at the plant on those days did not exceed fluctuations occurring prior to December 22, 1926. His affidavit shows his training and experience, and his competency to understand the matters concerning which he deposed. It also shows that statements are made upon personal knowledge (R. 27-32).

There is no conflict made by the counter-affidavits. Evelyn Griffeth deposes that the water overflowed the lands involved. That was just the event against which defendant sought insurance when it purchased the easement. Evelyn Griffeth did not depose, and would have been incompetent to depose, that the fluctuation of flow upstream at the power plant exceeded fluctuations occurring prior to 1926. And so with the affidavit of Edward Griffeth. He deposes that since he has been in possession of the land he has not been flooded. But what defendant acquired was not an easement for keeping water in the channel and off the land but one which would provide against flooding. Edward Griffeth did not, and could not, make proof that fluctuation of flow at the power plant on January 7, 1949, exceeded fluctuations occurring prior to December 22, 1926.

Many causes might intervene to affect the behavior of the stream below the Oneida plant and cause the flooding of plaintiffs' lands. But two factors would have to exist concurrently before defendant could be held liable. First, the fluctuation of the stream by defendant at the power plant would have to exceed the standard fixed by the terms of the easement, and second, the conduct of the defendant would have to be negligent. If the fluctuation of the stream remains with-

in the limitations fixed by the easement there can be no recovery against the Power Company for flooding, even though such flooding is caused or contributed to by the operation of the power plant.

THIS COURT HAS CONSTRUED AN EASEMENT
SIMILAR TO THE ONE UNDER REVIEW FAVOR-
ABLY TO APPELLEE'S CONTENTION

I-A

We respectfully submit that *Luama v. Bunker Hill & Sullivan Mining Co.*, 41 F. 2d 358, is controlling here. That case was tried before Judge Cavanah, and his decision was affirmed on appeal by the Circuit Court of Appeals for the Ninth Circuit. In that case an easement had been given to defendants by the plaintiff's predecessor in interest. The easement authorized the wasting of tailings and other material into the stream above plaintiff's land, and charged the land of plaintiff with the burden of such damages as might result from the flooding and the consequent deposition of foreign matter upon the riparian soil. The events contemplated by the easement occurred. Tailings were discharged into the streams. Flood waters covered the land and when they receded they left tailings and other impurities upon the soil. The easement was held to be a complete defense as a matter of law. That case was tried before the adoption of the new Federal Rules of Civil Procedure, and upon the trial the court held that the easement barred any recovery for the flooding. The same case would now be disposed of upon summary judgment under Rule 56.

I-B

THE BELATED EFFORT OF APPELLANTS TO
PROVE AN ANCIENT CONTRACT COVERING AND
THE ANCIENT POSSESSION OF PROPERTY
COVERED BY EASEMENT IS CONDEMNED BY THE
DOCTRINE OF LACHES.

Appellants would make much of the affidavit of Edward T. Griffeth filed in opposition to the Motion for Summary Judgment. By that affidavit an attempt was made to set up an equitable barrier to the operation of the easement. They would nullify the easement by the statement that at some indefinite and uncertain time prior to December 22, 1926, Griffeth entered upon a written contract with Thomas for the purchase of the land involved and went into possession of the property pursuant to such contract (R. 43).

There are two answers to the contention: (1) The affidavit of Edward T. Griffeth fails to satisfy the clear requirements of Rule 56 (e) and (2) the contention comes too late to escape the application of the rule of laches.

A part of Rule 56 (e) provides:

“Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.”

Instead of attaching to his affidavit the contract referred to and relied upon, he states: “This affiant does not have the original contract entered into or a copy thereof and does not

know where such contract is or if it is in existence in truth'' (R. 43). There is a clear failure to comply with the requirements of the rule. Appellants now seem to claim that Griffeth's alleged ancient possession should have put appellee upon notice of the contract and the rights of Griffeths thereunder, but he makes no lawful showing of the terms of any such contract. Since he specifically deposes that his possession was pursuant to the contract, it was essential for him to attach the contract to the affidavit; otherwise only speculation could possibly determine what the terms of the contract were. The contract might well have recited that Griffeths' right to possession should fall subsequent to the date of the easement, or it might have contained other terms wholly destructive to appellants' present contention.

It will be remembered that George Thomas gave the easement under review on December 22, 1926. It was placed of record on January 12, 1927. All through the years since January 12, 1927, the easement has been a matter of public record, and the record has been notice to all the world, including appellants and their predecessor in interest, Edward T. Griffeth. The easement remained unchallenged until May 22, 1952, a period of more than twenty-five years. Through all of those years, until April 11, 1951, George Thomas, grantor of the easement, lived and would have been available as a witness. He died on that day, and by his death appellee was deprived of an essential source of evidence as to the true facts of the matter under review. Under these circumstances the rule of laches will not permit the claims of Griffeth to nullify the easement. In 30 C.J.S., Sec. 119, page 542, 543, the following appears:

“A court of equity will refuse relief after inexcusable delay because of the difficulty, if not the impossibility, of arriving at a safe and certain conclusion as to the truth of the matters in controversy and doing justice between the parties, where the evidence has been lost or become obscured through the loss of documents, or through death or disappearance of one or more of the participants in the transaction in suit or of the witnesses thereto, or through impairment of the memory of participants or witnesses still living. While the rule requires for its support no element of estoppel, but is founded on public policy, the fact that the delay has tended to defeat defendant’s power to prove his right is an additional reason for its application; and relief is more readily denied in case of the death of a party to the transaction than in other cases, since his death usually presents difficulties in procuring evidence and conducting the defense other than those arising from the mere loss of his testimony. To bring the rule into operation, it is not necessary that the court should be convinced that the original claim was unjust or has been satisfied; it is sufficient if the court believes that under the circumstances it is too late to ascertain the merits of the controversy.”

The foregoing statement of the rule has been twice quoted and adopted as the law by this Court.

See, *Gillons v. Shell Oil Co.*,
86 F. 2d 600, 609;

The Kermit-Lamborn v. American Ship, etc.,
76 F. 2d 363.

At page 125, sec. 1245, *Barron & Holtzoff, Federal Practice and Procedure*, Vol. 3, it is stated:

“A summary judgment for defendant may be granted if the claim asserted against him is barred by the statute of limitations or by laches.”

In *Harris Stanley Coal & Land Co. v. Chesapeake & O. Ry. Co.*, 154 F.2d 450, the Circuit Court of Appeals for the Sixth Circuit, at page 455, says:

“Rule 56 (c) of the Federal Rules of Civil Procedure, provides that if there is no genuine issue as to any material fact that the moving parties are entitled to judgment as a matter of law. The purpose of the rule is to dispose of cases where there is no genuine issue as to material facts. *Fletcher v. Krise*, 73 App. D.C. 266, 120 F. 2d 809; *Miller v. Miller*, 74 App. D.C. 216 122 F. 2d 209; *Board of Public Instruction v. Meredith*, 5 Cir., 119 F. 2d 712. See commentary of Dean (now Judge) Clark, 15 A.B.A. Journal 82, 83. The federal courts have long recognized and enforced state summary judgment statutes. *Atkinson v. Bank of Manhattan Trust Co.*, 7 Cir. 69 F. 2d 735; *Schreffler v. Bowles*, 10 Cir., 153 F. 2d 1, and such judgments may issue for laches or because of limitation. *Gifford v. Travelers Protective Ass'n. of America*, 9 Cir., 153 F. 2d 209. The issues here presented by the record and pleadings primarily involve questions of law. The court was empowered to enter a summary judgment.”

Gifford v. Travelers Protective Assn. of America was decided by this court. It involved a limitation prescribed by an insurance policy. Under the applicable law of California the limitation so provided was binding if the period provided was reasonable in the judgment of the court. The trial court found the limitation to be reasonable and granted summary

judgment. This court affirmed. We construe the opinion of the court to mean that it was a matter of law for the trial court to decide whether the period provided in the policy was fair and reasonable. In the case now under review appellants withheld their claim of defect in the easement for a period longer than twenty-five years and until Thomas, who could have testified as to the facts, was dead. The trial court ruled as a matter of law that the delay was so great as to invoke the doctrine of laches.

Another reason why the doctrine of laches should apply is to be found in the fact that the easement given by Thomas to the appellee contains this language:

“Grantor and his successors and assigns hereby grant unto Utah Power & Light Company, etc.”

Under the laws of the State of Idaho the use of the word

“grant” in a conveyance implies a warranty that the instrument conveys all it purports to convey and that previous to the time of execution of such conveyance the grantor has not conveyed the same estate, or any right, title or interest therein to any person other than the grantee. (Idaho Code Section 55-612).

If there were any defects in the title granted by Thomas, to appellee, appellee would have had recourse against Thomas but appellants withheld assertion of their equitable right until Thomas died, twenty-five years after the grant.

II.

THE RECORD CONTAINS NO SUBSTANTIAL PROBATIVE EVIDENCE THAT APPELLEE WAS GUILTY OF ANY NEGLIGENCE CAUSING OR CONTRIBUTING TO THE INJURY COMPLAINED OF.

Appellant Melvin Griffeth took the stand in his own behalf and produced members of his family and neighbors who testified in his behalf. Melvin Griffeth showed that his land was flooded on January 7, 1949, but he produced no evidence that such flooding resulted from the negligence of appellee.

The trial court, at the close of the trial, made statements to the jury which contained this language:

“The Court: I don’t know how the Court can determine where this water came from. There is no evidence showing the handling of the dam at all. There is no evidence that this water came from the dam. The evidence shows an ice jam in the river of some fifteen feet or more in depth according to one witness. However, there is no evidence that the defendant was responsible for the ice jam, not one bit of evidence that I can determine to this effect.” (R. 127).

“The evidence shows that there was an ice jam in the river and that the ice jam was the cause of the flooding of the land.” (R. 143 & 144).

Those statements just about sum up the evidence of appellants and all of their witnesses.

Upon his cross-examination, appellant Melvin Griffeth pointed out the real cause of the ice jam and his consequent damage.

"Q. With respect to the temperature prevailing before that time and at that time, do you remember that temperature?

"A. I remember that it was cold.

"Q. Do you remember the time that it was 33 degrees below zero?

"A. Thirty-three below.

"Q. Do you remember that figure given by Mr. Anderson?

"A. Yes, sir.

"Q. Now, when was that with relation to the 7th of January?

"A. Near that time.

"Q. Just before?

"A. Yes, sir; just before.

"Q. For a week or ten days immediately preceding the 7th of January were they uncommonly cold days?

"A. Yes, sir; they were.

"Q. It was an extremely severe winter?

"A. Yes, sir.

"Q. It stayed zero or below every day for several days?

“A. Yes, sir.

“Q. So that the period immediately preceding the 7th of January, 1949, was excessively cold?

“A. Yes, sir.

“Q. Colder than you had had for many years for such a long time?

“A. Yes, Sir.” (R.84)

The effect of Melvin Griffeth's testimony was to show that cold weather of unprecedented severity persisted for a period of several days next preceding the formation of the ice jam which diverted the water onto his land. That proves only what the laws of nature teach us, that persistent cold weather will freeze running water and cause ice jams. To the extent that the ice jam dammed the flow of water, there would be more water at that point than normally. But his testimony does not prove any negligence in the operation of the power dam or any other negligence of appellee. V. D. Smart and Clarence Talbott testified that an ice jam formed and the land was flooded, but they added nothing to the testimony of Melvin Griffeth relating to appellee. Edward T. Griffeth testified that he never saw the land flooded before, but that just as cold weather had prevailed prior to 1926. The cold weather of 1926 doubtless accounted for the flooding referred to in the easement. Marion H. Wynn testified that there was an ice jam; that the water backed up behind it and that several streams flowed into Bear River between appellant's land and appellee's power plant.

John Warrick stated that the land was flooded as claimed by appellant. He denied that the river had theretofore overflowed its banks, but upon cross-examination admitted that he had granted and been paid for an easement for the flooding of his land adjoining those of appellant.

Ernest Carter, W. G. Palmer, Delos Griffeth and Evelyn Griffeth simply testified that the weather was cold; that there was an ice jam; which impounded the water and appellants' lands were flooded.

After appellants had rested and appellee had made its motion for a directed verdict, the trial court, upon motion of appellants, reopened the case, whereupon appellants called J. A. Hale to the witness stand. After being sworn, he identified himself as vice president in charge of engineering for appellee and stated that he was familiar with appellee's Oneida dam. He also stated that he was familiar with the operation of the Oneida dam and he is the same J. A. Hale whose affidavit was filed in support of appellee's motion for summary judgment. Over the objection of appellee's counsel, Hale was examined by appellants' counsel with respect to certain pre-trial interrogatories submitted to and answered under oath by him. He was available to answer any question which might be propounded by appellants, but appellants were content to have him identify his answer to the interrogatories. The interrogatories propounded before the trial and Hale's answers were put in the record by appellants while Hale was upon the witness stand. Appellants thus got into the record the following questions and answers:

“Interrogatory No. 20: Do you know whether or

not an ice jam occurred in Bear River in the vicinity of or where it flows through lands of plaintiff described in his complaint, which caused said river to overflow over and on the lands described in Plaintiffs' complaint?

“Answer: We have been informed that an ice jam occurred at the time referred to in interrogatory 20 which caused the overflow of plaintiffs' land.

“Interrogatory No. 21: If your answer to the foregoing question is ‘yes,’ will you state to what extent, if any, your regulation, manipulation and fluctuation of the flow of water in Bear River contributed to or caused said ice jams to occur, resulting in the flooding of plaintiffs' lands.

“Answer: None.” (R. 138)

From the foregoing it will appear that the answer of Hale furnishes the only evidence produced by appellants upon the question whether the power company's operation had anything to do with the formation of the ice jam and the flooding of plaintiffs' land. Appellants are left then with the record which shows that the activity of the appellee had nothing to do with the flooding of appellants' land.

From the foregoing we respectfully submit it is made to appear that wholly independently of the easement relied upon, appellee's motion for a directed verdict was good because of the complete failure of appellants to produce any evidence of negligence on the part of appellee causing or contributing to the flooding of appellants' lands.

III.

APPELLANTS' POINTS NOT SUSTAINED
BY RECORD

Appellants' Point I, their brief, p. 20. No genuine issue of fact was created by Edward Griffeth's affidavits. Appellants cite cases in support of the rule that possession of land by a vendee is sufficient to put others on inquiry as to his rights. In *Simmons Creek Coal Co. v. Doran*, 143 U.S. 475, 12 S. Ct. 239, 35 L. Ed. 1063, it is stated that "actual and unequivocal possession" gives notice, and in *Kirby v. Talmage*, 160 U.S. 379, 16 S. Ct. 349, 40 L. Ed. 463, it is said that "open, notorious and continued possession under apparent claim of ownership" will give notice. Griffeth, in his affidavit, was unable to specify any rights conferred by the contract which he could not find, and he did not set forth the nature of his claimed possession.

We have heretofore pointed out that the pretended claim of an ancient contract and an ancient possession were condemned by the trial court because assertion of the claims was so long delayed as to bring them within the rule of laches. See argument and cases cited pages 17 through 21 above.

Appellants' Point II, their brief, page 21. The intention of the parties and the interpretation of the easement was for the court and not the jury. The subject is fully covered in our argument at pages 11 to 16 above. No cases cited by appellants would authorize a construction of the easement which would defeat the clearly expressed purposes and intentions of the parties.

Appellants' Point III, their brief, page 24. Here appellants attempt to show evidence upon which a jury could find that appellee negligently caused the flooding. Contrary to the rules of this court, appellants' counsel failed to relate their recital of facts to appropriate or any pages of the record. At page 80 appellant Melvin Griffeth spoke generally of what had happened during the winter months, but the evidence there set forth does not sustain the claims made for it by counsel. Griffeth made no statements that would support finding of negligence on the part of appellee. He stated only what generally could be expected from year to year.

It is worthy of note that on page 82 of the record there appears testimony of the appellant Melvin Griffeth that he did not know of the existence of the ice jam which caused the flooding on January 7 until after the flooding. He was watching the river carefully for several days prior to the flooding but he was unaware of the very ice jam which caused his damage. It must be assumed that the offending ice jam developed too rapidly to give Griffeth or anyone else warning of what was about to occur.

In their argument on Point III, page 26 of their Brief, appellants set forth in quotation marks the following:

“there is no question that a person cannot by a dam, embankment or other artificial means obstruct the natural flow of water in a stream and cause it to overflow or run upon a reparian owner's land.”

Immediately following the foregoing is a citation to *Chandler v. Drainage District No. 2 of Boundary County*, 68

Ida. 42, 187 P. 2d 971. Reference to that decision shows that the Court's language, (P. 973, Pacific Reports) was this:

“There is no question that a person cannot by a dam, embankment, or other artificial means obstruct the natural flow of water of a stream and throw it back on the land of another without being liable for the resulting damages, *unless he has an easement or right upon or in such lands to do so.*”

It is without dispute in the record that the flooding of appellants' land resulted from ice in the river and not from any dam built by appellee. There is no evidence in the record that appellee negligently or otherwise caused the ice jam. It is equally undisputed in the record that appellee had an easement permitting it to cause the flooding of the land involved.

In addition to *Chandler v. Drainage District No. 2 etc.*, supra, appellants rely upon *Scott v. Watkins*, 63 Ida. 506, 122 P. 2d 220; *Fisher v. Davis*, 19 Ida. 493, 116 P 412; and *Hall v. Washington Water Power Co.*, 27 Ida. 437, 149 P. 507. All of those cases are clearly distinguishable from the case here under review. In each of those cases the defendant actually constructed a dam or other barrier to the flow of the stream. In *Scott v. Watkins*, supra, plaintiff alleged and proved the construction of a dam across a slough, which caused the backing up of water onto plaintiff's land. Plaintiff also made proof that he had consented to the construction of the dam subject to provision for drainage of the water through a box or sluice. He then proved failure of the defendant to provide the box or sluice in accordance with the agreement. Under those facts it was held plaintiff was entitled to recover.

In *Fisher v. Davis*, *supra*, plaintiff proved that defendant had built cribs in the Boise River to divert the channel away from his own lands and prevent erosion. Proof showed that defendant had gone so far in his efforts to divert the current as to cause it to cross the river and flood the plaintiff's land. In that case there was clear proof of the actual construction of the dam and that the construction was the proximate cause of plaintiff's injury.

In *Hall v. Washington Water Power*, *supra*, the construction of a dam across the water way by the defendant was alleged and proved by the plaintiff, but plaintiff failed to prove that the construction of the dam was the proximate cause of his injury. He was therefore nonsuited and the order of nonsuit was affirmed.

In *Thies v. Platte Valley Public Power etc.*, 289 N.W. 386, 137 Nebr. 344, the Nebraska court was dealing with a set of facts clearly distinguishable from those presently under review. In that case the plaintiffs, being under the burden of proving negligence on the part of defendant and a causal connection between that negligence and their injury, produced qualified engineers who testified that the operation of the dam was such as to produce, and did produce, the ice jams and the resultant flooding. In the case before us the only qualified engineer who was sworn and testified was J. A. Hale, and his uncontradicted testimony is that the formation of the ice jam which caused the flooding of appellants' land was not caused or contributed to by the operation of the dam (R. 138-139).

Appellants' Point IV, their brief, page 27. Appellants' argument under this point evidences a refusal or reluctance to

recognize the effect of the trial court's ruling on the Motion for Summary Judgment. By its motion for summary judgment appellee brought before the court the easement. It proved the circumstances under which the easement was granted. It proved the granting and recording of the easement and then took the next step and proved that the operation of the power plant at the time complained of by the plaintiffs was within any restrictions contained within the easement (R. 27-32). There was no genuine issue presented to the court involving these facts. They went unchallenged and were subject to disposal by the court under Rule 56. In disposing of the motion for summary judgment the court ruled without reservation that the easement was a valid and subsisting easement. He then, in effect, ruled that appellee had made prima facie proof of its compliance with the restrictions in the easement. The case might have been disposed of upon its merits at that point, but the trial court reserved an opportunity for appellants to meet the prima facie case made by appellee with respect to the operation of the power plant. The effect of this ruling was to accord an opportunity to the plaintiffs which the trial judge might well have withheld in his ruling on the motion for summary judgment.

The rule announced in the cases relied upon by appellants that a defendant who pleads an affirmative defense assumes the burden of proving it has been fully satisfied as shown by the record in this case.

No evidence was offered by appellants that appellee had departed from the terms of the easement. When trial began appellants were confronted with a pretrial adjudication that

appellee owned and possessed the easement, and a ruling that appellee had made a prima facie case of compliance with the terms of the easement. There was no evidence before the jury as to the extent, if any, of stream flow fluctuation at the plant in excess of normal fluctuations which had occurred prior to the granting of the easement. It was up to appellants then to make proof of negligence upon the part of appellee causing or contributing to the injury. The only proof they made upon that particular point was made through the witness Hale, whose uncontradicted testimony was that the operation of the power plant had no effect upon the flooding of appellants' land.

Appellants' Point V, their brief page 31. This point is a summary and presents no matter not already covered by the preceding argument. Appellants in Point V again show their unwillingness to construe the easement as a whole. They ignore the last paragraph of the easement which charges the land with the burden of receiving ice and water from the river.

CONCLUSION

Appellants by their original complaint charged appellee with flooding their property and negligently operating the Oneida power plant.

Appellee filed its answer denying all charges of negligence. It pleaded a flood easement in defense of appellants' claim. Appellee then elected to avail itself of the procedure provided

by Rule 56 of the Federal Rules of Civil Procedure. By motion and affidavit it proved:

(a) That it had a valid and subsisting flood easement covering the lands in suit; and,

(b) That the operation of its plant was within the restrictions of the easement.

The trial court ruled that proof of the easement had been made; that the easement was valid and binding upon appellants; and that prima facie proof of compliance with restrictions in the easement had been made.

The order of the court reserved to appellants an opportunity to prove negligent operation of the power plant which went beyond the terms of the easement.

Appellants failed to prove abuse of the terms of the easement and failed to prove any causal connection between the flooding of their lands and the conduct of appellee.

At the beginning of the trial when the amendment was permitted to include additional lands, appellants admitted the existence of the easements.

Through the witness Hale, appellants proved that there was no connection between the operation of the power plant and the flooding of the land.

A directed verdict was ordered, and we respectfully submit the order should be affirmed.

Respectfully submitted,

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APPENDIX "A"

Sec. 55-612, Idaho Code, COVENANTS IMPLIED FROM GRANT.—From the use of the word "grant" in any conveyance by which an estate of inheritance, possessory right, or fee simple is to be passed, the following covenants, and none other, on the part of the grantor, for himself and his heirs, to the grantee, his heirs and assigns, are implied, unless restrained by express terms contained in such conveyance.

1. That previous to the time of the execution of such conveyance, the grantor has not conveyed the same estate, or any right, title or interest therein, to any person other than the grantee. * * *

Sec. 55-811, Idaho Code. RECORD AS NOTICE.—Every conveyance of real property acknowledged or proved, and certified, and recorded as prescribed by law, from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees.

Every conveyance of real property acknowledged or proved, and certified, and recorded as prescribed by law, and which is executed by one who thereafter acquires an interest in said real property by a conveyance which is constructive notice as aforesaid, is, from the time such latter conveyance is filed with the recorder for record, constructive notice of the contents thereof to subsequent purchasers and mortgagees.

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 13611

MELVIN GRIFFETH and LOIS D. GRIFFETH, *Appellants*,

vs.

UTAH POWER & LIGHT COMPANY, a Corporation, *Appellee*.

REPLY BRIEF OF APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

HONORABLE CHASE CLARK, *Judge*

WALTER H. ANDERSON and GUS CARR ANDERSON,
Residence: Pocatello, Idaho

NEWEL G. DAINES, Residence: Logan, Utah

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Attorneys for Appellants

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United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 13611

MELVIN GRIFFETH and LOIS D. GRIFFETH, *Appellants*,

vs.

UTAH POWER & LIGHT COMPANY, a Corporation, *Appellee*.

REPLY BRIEF OF APPELLANTS

POINT AND AUTHORITIES

1. All reasonable doubts touching existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment and if the court has a reasonable doubt, summary judgment will not be granted.

Traylor vs. Black, Sivalls & Bryson, 189 F 2d 213,

Chappel v. Goltsman, 186 F 2d 215,

Arnstein vs. Porter, 154 F. 2d 464,

2. If there is any question as to the credibility of witnesses a summary judgment will be denied.

Ramsouer vs. Midland Valley R. C., 44 F. Supp. 523,
reversed on other grounds, 135 F. 2d 101;

Boro Hall Corp. vs. General Motors Corp., 164 F. 2d
770.

3. The evidence presented at the hearing is liberally construed in favor of the party opposing the motion and he is given the benefit of all favorable inferences which might reasonably be drawn from the evidence and all doubts

as to the existence of a genuine issue must be resolved against the moving party.

Whittlin vs. Giacalone, 154 F. 2d 20;

Parmelee vs. Chicago Eye Shield Co., 157 F. 2d, 582;
168 A.L.R. 1130.

Hawkins vs. Frick-Reid Supply Corp., 154 F. 2nd.
88;

Toeelman vs. Missouri-Kansas Pipe Line Co., 130
F. 2d, 1016.

4. Affidavits in support of summary judgment must be made on personal knowledge, shall set forth facts showing personal knowledge and setting forth facts which would be admissable in evidence as if affiant was a witness testifying in Court.

Walling vs. Fairmont Creamery Co., 139 F. 2d 318;

Sprague v. Vogt, 150 F. 2d, 795;

Rule 56(e) F.R.C.P.;

Federal Practice and Procedure by Barron and
Holtzoff, Vol. 3, page 93, Sec. 1237.

5. Opinions, beliefs, conclusions, summary of fact or hearsay statements are inadmissable.

Walling vs. Fairmont Creamery Co., 139 F. 2d 318;

Sprague vs. Vogt, 150 F. 2d 795.

6. Where both parties are guilty of laches both parties will be left in the position in which equity originally found them.

Marshall vs. Meyer, 92 N.W. 693, 118 Iowa 508;

Mays vs. Morrell, 132 Pac. 714;

Loughran vs. Ramsburg, 197 Atl. 804, 808, 174 Md.
181.

7. One who is in peaceable possession of property under a claim of right may rest in security until his title or possession is attacked and the failure to appeal to equity during that period is no defense to a suit subsequently brought to establish, enforce or protect his right.

Cleveland Clinic Foundation vs. Humpherys, 97 F. (2) 849 certiorari denied, 59 S. Ct. 93, 305 U.S. 628, 83 L.Ed. 403, 121 A.L.R. 163;

Branford vs. Shirley, 193 So. 165, 238 Ala. 632;

Copelan vs. Monfort, 113 S.E. 514, 153 Ga. 558;

Lutton vs. Steng., 227 N.W. 414, 208 Iowa 1379;
30 C.J.S. 538, Sec. 116 (C)

8. While delay in enforcing a right is an element of laches, such delay has not in and of itself constituted laches.

30 C.J.S. p. 531 Sec. 116

ARGUMENT

I

THE PARTIAL GRANTING OF THE SUMMARY JUDGMENT IS NOT JUSTIFIED BY THE RECORD NOR DOES THE RECORD SUSTAIN APPELLEE'S CLAIM THAT IT DISCHARGED ITS BURDEN OF PROOF.

Reply to the Appellee's argument I, page 4 of its brief.

The Appellee concedes that the burden of proving the lands were subject to an easement and that it had discharged the conditions imposed under the easement was with it. It then asserts that it made such proof at the hearing on its motion for summary judgment and that the trial court so held. The claim is without foundation and not supported by the record. The trial court's order regarding the Appellants' motion for summary judgment was as follows:

"Now, therefore, the Court is of the opinion that the summary judgment should be granted in part as suggested at oral argument in that plaintiffs are bound by the release and easement agreement. This can be taken care of at the time of the trial.

The summary judgment will be denied subject to the above reservation.

In view of the above, the motion to strike certain portions of the affidavit of J. A. Hale in support of the motion for summary judgment will be denied, and it is so Ordered." (R. 47, 48)

If Appellee had sustained its burden of proof upon its motion for summary judgment the court would not only have held that Appellants' lands were subject to the easement but it would have granted wholly Appellee's motion for summary judgment.

At the hearing on Appellee's motion for summary judgment the Appellants moved to strike part of the J. H. Hale's affidavit, beginning with paragraph 3 to the end thereof. The affidavit, beginning at paragraph 3 among other things, set forth that the Appellee's power plant at Oneida, Idaho, during the months of December, 1948 and January 1949, was operated normally and that fluctuations of Bear River by reason of the operation of the dam at Oneida were no greater in the months of December, 1948 and January, 1949 than the fluctuations which occurred prior to December, 22, 1926, (R. 23, 27, 47) and is the evidence the Appellee seeks to rely on in sustaining its burdens of proof.

The trial court in granting the summary judgment in part, ruled that the Appellee had not met its burden of proof, that it had performed the conditions imposed upon it by the easement, and this is clear as the court in its ruling said that inasmuch as it was only granting the motion for summary judgment in part it was unnecessary to grant Appellants' motion to strike.

If Appellee was serious in its contention that it had met its burden of proof it would have cross-appealed from the trial court's order denying in part its summary judgment and would not rest its contention upon such an argument.

A brief consideration of J. A. Hale's affidavit will clearly show that the court did not and could not have ruled that the Appellee had met its burden of proof, as the affidavit on its face shows that his statements were based on hearsay and not upon personal knowledge. The affidavit set forth that Hale was a resident of Salt Lake City; Utah; that Oneida dam is located on Bear River in Franklin County, Idaho; that he was employed by Appellee from 1913 to 1923 as a civil engineer, when he became assist-

ant chief engineer, until 1926, when he became chief engineer and then in 1937 he was made vice-president in charge of engineering. He stated he was "familiar" with the construction of the Oneida dam, was "personally familiar with said dam, and personally familiar with its operation," that George Thomas presented a claim for damages for flooding and that the plant was operated normally in the months of December, 1948 and January, 1949 and that the fluctuation of Bear River was no greater during these months than that which occurred prior to 1926.

Oneida, Idaho, is approximately 125 miles north of Salt Lake City, Utah.

The affidavit does not say that Hale was employed at the Oneida dam, that he worked at the dam in December, 1926, or December, 1948 or January, 1949, that he was ever in charge of the dam or had anything to do with its operation or control of the water flow through the dam. The only information that Hale could give regarding such operations would be hearsay based on reports of others. This would be particularly true after 1937 when he became its vice-president in charge of engineering. The Hale affidavit showed on its face that he did not have personal knowledge of the fact set forth therein and that it was based on hearsay, and it did not set forth facts showing that his statements were based on personal knowledge, a primary requirement of an affidavit in support of motion for summary judgment.

An affidavit in support of a summary judgment must not only allege that affiant had personal knowledge of the facts but it must set forth facts personally showing that he had such knowledge, and summary judgment cannot be based upon opinions, beliefs, conclusions and hearsay.

Walling vs. Fairmont Creamery Co., 139 F. 2d 318;
Sprague vs. Vogt, 150 F. 2d 795;

Rule 56(e) F.R.C.P.;

Federal Practice and Procedure by Barron and Holtzoff, Vol. 3, page 93, Sec. 1237.

Furthermore, the affidavit of Evelyn P. Griffeth filed in opposition to Appellee's motion for summary judgment put in issue the question as to whether Appellee had performed the conditions imposed upon it under the terms of the easement. The affidavit of Evelyn P. Griffeth stated as follows:

"Evelyn Griffeth, being first duly sworn, deposes and says: That she lives in Franklin County, Idaho, and that she is seventy years old; that she has lived upon lands adjoining the lands involved herein, now owned by Melvin Griffeth and his wife, and above and east of said lands on said river; that this affiant knows of her own personal knowledge that for forty-five years, with the exception hereinafter noted, she has lived upon same and that the said river never was out of its channel.

"That in January, 1949, the said river overflowed its channel on said land and deep enough on said lands of said Melvin Griffeths at said time to reach to the armpits of her son Von Griffeths when he went out on the said lands of Melvin Griffeths to try to save cattle while the river had risen; that all of these things are of the personal knowledge of this affiant and are not based on anything somebody might have told her." (R. 45)

The basic facts which Appellee was required to show under its motion for summary judgment was that the flow of water which took place during the months of December, 1948 and January 1949 were not greater than the flow of water that took place on December 22, 1926, the date of the purported easement.

A summary judgment will not be granted if there is a conflict in the evidence.

Hoff vs. St. Mercury Indemnity Co., 74 Fed. 2d 689.

All reasonable doubts touching existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment and if the court has a reasonable doubt summary judgment will not be granted:

Traylor vs. Black, Sivalls & Bryson, 189 F. 2d 213,
216;

Chappel vs. Goltsman, 186 F. 2d 215,

Arnstein vs. Porter, 154 F. 2d 464.

The burden of demonstrating clearly that there is no genuine issue of fact and any doubt as to the existence of such an issue is resolved against the moving party:

Whittlin vs. Giacalone, 154 F. 2d 20;

Parmelee vs. Chicago Eye Shield Co., 157 F. 2d 582;
168 A.L.R. 1130.

The evidence presented at the hearing is liberally construed in favor of the party opposing the motion and he is given the benefit of all favorable inferences which might reasonably be drawn from the evidence and all doubts as to the existence of a genuine issue must be resolved against the moving party:

Hawkins vs. Frick-Reid Supply Corp., 154 F. 2d 88;

Toelman vs. Missouri-Kansas Pipe Line Co., 130
F. 2d 1016;

Whittlin vs. Giacalone, 154 F. 2d 20.

The Appellee's contention that the Appellants admitted the existence of an easement to flood is without foundation. Upon the hearing of Appellant's motion to amend its complaint to include other lands under lease by Appellants the Appellee protested that it had an easement to this

land as well and Appellants agreed that its answer asserting an easement would include the lands covered by the amendment. There was no admission that the lands of the Appellants were subject to an easement. (R. 59, 63)

To the Appellee's argument that the easement granted it the right to flood Appellants' land, we refer the court to Appellants' arguments in their brief. However, to the Appellee's contention that unless the agreement granted it a right to flood the Appellants' lands it would have contracted for an idle and useless thing, we would like to point out that such is not the case as the right to manipulate and fluctuate the stream at the power plant was primarily the matter in which they were concerned as this right affected the daily operation of its power plant at Oneida. When it contracted for the right to fluctuate the water as it flowed through the lands of the Appellants it was assuring itself of the daily operation of its power plant without being subject to damages and complaint for the interference with the flow of the water, a violation of the right to have the stream flow undiminished in quantity through the property, and it relieved it from the responsibility of the damages incurred by the interference with and the changing of the lands' water table. It was of such importance to Appellee that in paragraph 2 of the agreement Appellee secured a release for damages occurring prior to December, 1926 for damages caused "or by the fluctuation of the flow of the river." We believe that from a reading of the entire agreement, including the granting clause, it can fairly and reasonably be said that all the Appellee was interested in by way of an easement was to secure itself in the daily operation of its power plants at Oneida and elsewhere against claims for the manipulation and fluctuation of the flow of the river and it was satisfied to secure a personal release from the Appellant's predecessors in interest for future damages for flooding or depositing ice.

II

THIS COURT'S CONSTRUCTION OF AN AGREEMENT TO FLOOD LANDS HAS NO APPLICATION EXCEPT AS DETERMINED THAT AN AGREEMENT TO FLOOD LANDS IS AN EASEMENT PERTINENT TO THE LAND RATHER THAN A PERSONAL OBLIGATION.

Reply to Appellee's Argument No. 1, of brief page 16. The only application here of the case of *Luama vs. Bunker Hill & Sullivan Mining Company*, 41 F. 2d 358, is that an agreement to deposit tailings in to a stream and upon the lands of another is an easement appurtenant to the land, covenant running with the land rather than a personal obligation. It holds that although there is no servient estate yet it will be construed as an easement pertinent rather than an easement in gross. Except as stated it has no application to the case involved and it does not dispose of the question as to whether by the terms of the grant in question the Appellee's easement is limited to a right to fluctuate the stream as it passes through Appellant's lands or whether it has a right to flood or deposit ice, conditionally, thereon. Furthermore, it is no help in determining, assuming Appellee has the right to flood Appellants' land conditionally that such right covers a flooding not originating from the channel as it passes through the lands of the Appellants.

III

APPELLANTS' EFFORT TO PROVE THAT THEIR LANDS WERE NOT SUBJECT TO THE EASEMENT BY REASON THAT THE EASEMENT WHEN GIVEN WAS SUBJECT TO THE RIGHTS OF THE PARTIES IN POSSESSION WHEN EXECUTED IS NOT BELATED AND LACHES DO NOT APPLY.

Appellee Argument 1-B, P 17 its brief.

It should be pointed out that the Appellants are no more guilty of laches than the Appellee. The Appellants

had the same notice. The Appellee is charged with the notice of Appellants and Appellants' predecessors in interest claims to the land, and during this time the Appellee did nothing to establish the validity of its easement as against the Appellants or their predecessors in interest. Appellants did assert their claim as soon as any damages accrued and in this respect were not guilty of delay. It is a recognized rule in equity that where both parties are guilty of laches both parties will be left in the same position in which equity originally found them, and this is certainly the case here. Neither the Appellants nor their predecessors in interest sought to remove nor did the Appellee seek to sustain the easement. It is not for equity to take sides in such a situation and the law so holds. *Marshall vs Meyer*, 92 N.W. 693, 118 Iowa 508; *Mays vs. Morrell*, 132 Pac. 714. When both parties are at fault neither can assert laches against the other. *Loughran vs. Ramsburg*, 197 Atl. 804, 808; 174 Md. 181. In this connection the Appellants have asserted their rights as soon as they were injured and there was no delay in the exercise of that right. The easement is a collateral issue. One who is in peaceable possession of property under claim of right may rest in security until his title or possession is attacked and the failure to appeal to equity during that period is no defense to a suit subsequently brought to establish, enforce or protect his right. *Cleveland Clinic Foundation vs. Humpherys*, 97 Fed. 2d 849, certiorari denied, 59 S. Ct. 93, 305 U.S. 628; 83 L.Ed. 403, 121 A.L.R. 163; *Branford vs. Shirley*, 193 So. 165, 238 Ala. 632; *Copelan vs. Monfort*, 113 S.E. 514, 153 Ga. 558; *Lutton vs. Steng*, 227 N.W. 414, 208 Iowa 1379. This is exactly what happened here. The Appellants' right was exercised upon the Appellee flooding of Appellants' land and they are not guilty of laches for now attacking the purported easement.

The question of laches was never before the court

either by answer or motion for summary judgment. (R. 19, 23.) The motion for summary judgment did not specify laches as a basis for its motion. It is true that on the date of the hearing of the motion for summary judgment that the Appellee filed an affidavit to the effect that George Thomas, one of the grantees, was dead. However, nothing was set forth in the affidavit to the effect that Anna E. Thomas, wife of George Thomas, was either dead or alive or whether she had any knowledge regarding the transaction involving the granting of the contract. (R. 46; 34.) As the motion for summary judgment did not set forth laches as a ground, this question was not before the trial court and the granting of the summary judgment on this ground cannot be sustained.

In any event, the only evidence before the court as to laches was the element of delay and while delay in enforcing a right is an element of laches such delay does not in and of itself constitute laches and the court could not have held that the doctrine applied provided the question had been presented to it. 30 C.J.S. p. 351, Sec. 116.

IV

THE RECORD ESTABLISHED THAT THE DAMAGES SUSTAINED BY THE APPELLANTS WERE PROXIMATELY CAUSED BY THE ACTS OF APPELLEE AT ITS ONEIDA DAM.

Reply to Appellee's Argument II, page 22 of its brief.

There is no basis for the Appellee's contention that the Appellants failed to show that their damages were caused by the acts of the Appellees. It bases its claim on a failure to show negligence. In this respect we again call the court's attention to the Idaho decisions at page 26 of Appellants' brief. The cases clearly set forth the rule in Idaho to be

that where one creates an obstruction to the natural flow of water or so handles the obstruction that a person's property is injured he has a good cause of action. The showing of negligence is not essential. All the injured party has to establish is that the obstruction or handling of the obstruction caused the injury. However, as pointed out in Appellants' brief, Appellants' proof went farther than was required under the Idaho decisions and they established that the Appellee was guilty of negligence in the handling of its dam at Oneida and that such was the proximate cause of the injury complained of. Appellants' evidence established that their property was approximately fourteen miles down stream south of Appellee's dam at Oneida; that all of the water coming down Bear River at Oneida must pass through the dam; that prior to the erection of the dam in the winter months the river would freeze over, water running under the ice and never flooded, that after the erection of the dam the Appellee interfered with the flow of the water manipulating and controlling it as it saw fit, releasing such quantities of water as it elected; it would send forth small quantities in the morning and larger quantities in the afternoon and in the winter instead of ice forming over the channel as it did prior to the erection of the dam, with the water running under it, ice would form when limited amounts of water were released at the dam breaking up when larger quantities were released. This ice would settle to the bottom of the river and then was broken loose upon the release of additional water, causing ice jams to occur in the river. It was one of these ice jams and the sending of large amounts of water down the river which caused the flooding of Appellants' lands. That during the period when Appellant's lands were flooded the evidence established that the Appellee was releasing more water from the dam than it was accumulating in its water storage facilities at the

Oneida dam and elsewhere up stream than flowed into such facilities from Bear River's natural water shed. The evidence further established that the Appellee was warned by Melvin Griffeth, one of the Appellants, that if it continued to regulate the water as it was doing his land would be flooded and Mr. V. D. Smart, maintenance foreman of the State Highway Department also warned Appellee that ice jams were forming near the Preston-Dayton River bridge flooding over the road and unless it did something about it he was afraid the bridge would be lost.

The Appellee ignored these warnings and did not change its operation of the dam at Oneida and continued to manipulate the flow of water and released from its dam at Oneida more water than flowed into the river from its natural water shed.

Appellee ignores in its argument all of the foregoing facts seeking to avoid liability by reason of cold weather asserting that the cold weather was the cause of the ice jams. Unquestionably the cold weather did contribute to the formation of the ice jams. However, it was only one fact in connection with the other conditions hereinabove mentioned which caused the ice jams to form and flood Appellants' lands. True, it was a cold winter but Appellee knew and it knew it better than anyone else for it kept daily temperature readings. Certainly these conditions imposed upon Appellee the duty of regulating the water as it flowed down Bear River as not to create conditions which would result in the flooding of Appellants' land.

We respectfully submit that Appellants established a case under the Idaho authorities and we believe that the record sustains us, if necessary that Appellee was negligent in the operation of its dam, and that such was the proximate cause of Appellants' damages. In this respect we again call this court's attention to its decision in the case

of *Inland Power & Light Company vs. Greiger*, 91 F. 2d 811. The Appellee does not challenge this decision and its application.

CONCLUSION

In conclusion we believe the trial court's decision should be reversed and the cause remanded with instructions to submit the matter to a jury.

Most respectfully submitted,

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